Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1708

STATE OF NEW YORK,

Petitioner,

and

S & E Shipping Corp. and Seafarers International Union of North America, AFL-CIO,

Respondents,

vs.

UNITED STATES of America and Interstate Commerce Commission,

Respondents,

and

Pennsylvania Public Utilities Commission, Consolidated Rail Corporation, Soo Line Railroad Company and ConAgra, Incorporated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224
Telephone (518) 474-7173

SHIRLEY ADELSON SIEGEL
Solicitor General,
State of New York

JEREMIAH JOCHNOWITZ
Assistant Solicitor General,
State of New York
of Counsel

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute of the United States Involved	2
Statement of the Case	3
Prior Proceedings Before the Commission	5
Interest of the State of New York	5
First Court of Appeals Decision (568 F2d 887 [2 Cir. 1977])	6
Opinion of the Court of Appeals (600 F2d 349; Appendix C)	7
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	15

TABLE OF AUTHORITIES

Page

Cases

Interstate Commerce Commission v Mechling, 330 US 567 (1947) 12

Seatrain Lines, Inc. v United States, 233 F Supp 199 (DNJ, 1964). 11

State of New York v United States, 568 F2d 887 (1977) . . 3, 10

Western Pacific Railroad v United States, 382 US 237 (1965) 14

Western Pacific Railroad Company v United States, 263 F Supp 140 (ND, Cal, 1966) 10

Federal Statutes

Interstate Commerce Act (49 USC §3, par [4]) 2

28 USC §1254(1) 2

Miscellaneous

346 ICC 814 5

346 ICC at 835 5

351 ICC 470 5

356 ICC at 92 10

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Petitioner, in this cause in which it is claimed that an order of the Interstate Commerce Commission relating to the shipment of grain unlawfully discriminates against Great Lakes grain carriers, prays that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case January 31, 1980, in which the Court denied rehearing and adhered to an order of the Court dated May 7, 1979 (Appendix "C"), affirming an order of such Commission made January 18, 1978 (Appendix "B").

Opinion Below

The opinion for affirmance by the Court of Appeals was handed down May 7, 1979 and is reported at 600 F2d 349. It is set forth as Appendix "C".

Jurisdiction

Decision and mandate of the Court of Appeals was entered on May 7, 1979 (Appendix "C"). A Petition for Rehearing was timely filed. Rehearing was denied by order of the Court of Appeals dated January 31, 1980 (Appendix "F").

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by *writ of certiorari* is 28 USC §1254(1).

Question Presented

Whether a disparity in freight rates between carrying wheat on all-rail routes and carrying wheat from a connecting lake carrier is discriminatory under the provisions of the Interstate Commerce Act §3(4), where the rail rate for a ton-mile is approximately twice as high for the lake-rail route than for the all rail-route and where there is no evidence of such a disparity in costs of transportation.

Statute of the United States Involved

Interstate Commerce Act, §3, subd 4 (49 USC §3, par [4]):

"**§3, par. (4). Interchange of traffic.** All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any

connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

Statement of the Case

Involved in this proceeding is an order of the Interstate Commerce Commission, hereinafter referred to as Commission, dated January 18, 1978 (356 ICC 82, Appendix "B") which approved rates for transportation of wheat from Minneapolis and St. Paul, Minnesota (Twin Cities) and Duluth, Minnesota and Superior, Wisconsin (Twin Ports) to Martins Creek, Pennsylvania where ConAgra, a shipper, has its mill. The proposed schedule includes summer and winter rates.* The issue here is whether the disparity in the proposed rates for transportation of wheat from Twin Cities and Twin Ports to Martins Creek, Pennsylvania by an all-rail route and that of transporting wheat from a connecting lake-carrier at Buffalo, New York to Martins Creek was discriminatory within the provisions of Interstate Commerce Act, §3, subd 4, hereinafter referred to as section 3(4).

The railroads involved are the Soo Line Railroad Company (Soo), which carries wheat from the point of origin to Chicago and the former Erie Lackawanna Railway Company, now Consolidated Rail Corporation (ConRail), which carries wheat from Chicago to Martins Creek either directly or through Buffalo.

The summer rates are those involved when the Great Lakes are open to navigation and the winter rates are those in effect when the lakes are closed to lake carrier transportation. The lake-rail route is from Twin Ports to Buffalo by lake carrier and then by rail to Martins Creek.** The all-rail route, which moves wheat from Twin Cities and Twin Ports to Chicago and thence

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*The winter rates are not at issue in this proceeding.

**A straight line diagram of the rail and water routes is shown in *State of New York v United States*, 568 F2d 887 (2d Cir, 1977) at page 891 (Appendix A).

either directly to Martins Creek or through Buffalo to Martins Creek, competes with the lake-rail route.

The respective rail mileages are: Twin Ports and Twin Cities to Martins Creek, 1379 miles; Buffalo to Martins Creek, 340 miles, and Chicago to Martins Creek, 910 miles. The overall rail rate from Twin Ports and Twin Cities is 72.25 cents per hundred pounds, with 47 cents of that being paid to the carrier for services from Chicago to Martins Creek. khe rate from Buffalo to Martins Creek is 40 cents per hundred pounds.

The winter rates, when no competition exists from lake-rail routes, are higher. The winter rate for all-rail transportation is 88 cents per hundred pounds with 57 cents going to the shipper from Chicago to Martins Creek. The winter rate for shipments from Buffalo to Martins Creek is 47 cents per hundred pounds.

The following table is a breakdown of the summer rates.

Rail Route	Rate		Mileage		Revenue Per Mile
Twin Ports to Martins Creek	72.25¢	+	1,379	=	.0524¢
Chicago to Martins Creek	47¢	+	910	=	.0516¢
Buffalo to Martins Creek	40¢	+	340	=	.1176¢

(JA, p. 21)

The supplemental record shows that rates on both routes have been increased. However, the relative disparity between ton-mile transportation continues to be approximately the same.

Thus there is a ratio of about two to one in the rate for transportation of wheat per ton-mile from the Buffalo wheat carrier's port as against that on the all-rail route. The Commission in its first decision stated:

> Protestants also developed ratios of rates to costs for both the existing Buffalo to Martins Creek rate and Erie's division of the proposed rates. Thus the 40-cent Buffalo to Martins Creek rate yields 142 percent above variable costs for movements in railroad cars and 178 percent for

> shipper cars. On a fully allocated basis the excess is 73 and 90 percent, respectively. In comparison, the proposed rates will yield only 68 percent above variable costs for shipments in railroad cars and 60 percent in shipper cars. On a fully allocated basis the excess [is] 18 and 14 percent, respectively. 346 I.C.C. at 830. (JA, p. 457a).

It has been accepted in this proceeding that the yield per ton-mile from Buffalo to Martins Creek was substantially more profitable than those from the all-rail routes (346 ICC at 835; JA, p. 462a).

Prior Proceedings Before The Commission

The Commission first considered the rates in a report dated June 18, 1974 (346 ICC 814). The proposed rate for wheat shipment during the open navigation season from Twin Ports to Martins Creek was found to be lawful. The corresponding rate from Twin Cities was found to be unjust as unduly preferential to Twin Cities and prejudicial to Twin Ports in violation of Interstate Commerce Act, §3(1). Because of this, a new schedule was ordered in conformity with its report.

The State of New York then applied for and was granted leave to intervene in the reconsideration proceeding. By order dated June 27, 1975 (351 ICC 470), Division 2 of the Commission acting as an Appellate Division, denied reconsideration as to the rates which had been approved, and granted reconsideration with respect to the unlawfulness of the Twin Cities summer rate and reversed its prior finding that the Twin Cities summer rate was unlawful. It thus approved all rates.

Interest of the State of New York

This case involves movement of wheat which is milled into flour to be used and sold to residents of the State and others. The State's interest arises from its duty to protect its citizens, water carriers serving its ports and others. New York's interest,

whether called *parens patriae* or by any other name, results from the State's duty to protect the public interest.

The rates, if allowed to stand, will divert large shipments of wheat from the combined lake-rail route to the all-rail route, affecting the shipping industry and labor forces in Buffalo, New York. The proposed rates, because the costs of transportation are a significant element in the overall cost of flour and since they favor all-rail transport when compared to lake-rail transport, would result in a large amount of such traffic being diverted from Buffalo's port and harm the City's economic conditions, its labor forces and retard its further development. The disparity in rates between the all-rail route and the lake-rail route with transshipment at Buffalo unjustly discriminates against lake-water carriers serving Buffalo. There is no evidence of a cost factor as a reason for this disparity. The disparity is clearly detrimental to the public and to the lake carriers serving the State of New York.

First Court of Appeals Decision
(568 F2d 887 [2 Cir. 1977])

The order of the Commission was reviewed by the United States Court of Appeals for the Second Circuit in a proceeding in which New York State was the petitioner. The State claimed that both summer and winter rates from Twin Ports and Twin Cities were unlawful, being violative of sections 3(1) and 3(4) of the Interstate Commerce Act. The Court of Appeals found that the proposed rates did not violate section 3(1), but found there was discrimination under section 3(4). The order of the Commission was set aside "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines".

The Commission had held that the lake carriers were not "connecting lines". That holding was reversed, the Court determining that the lake carriers were "connecting lines".

There followed a second proceeding before the Commission, which concluded in the order of January 18, 1978 and an appeal was taken from that order to the United States Court of Appeals for the Second Circuit.

Opinion of the Court of Appeals
(600 F2d 349; Appendix C)

The Court held that there was substantial evidence to support the Commission's finding that unit train service, which was available on the all-rail route, was more efficient and economical than movement in single or five-car lots used at Buffalo, and that normal utilization of unit train services was not available on the Buffalo to Martins Creek haul.

On the question of discrimination at the Port of Chicago,* the Court noted that ConRail is prepared to enter into equal rate arrangements with all "connecting carriers". As for Buffalo, it said that all "connecting carriers" are "already treated the same". The change favoring Chicago created another discrimination against Buffalo in that lake shippers in Chicago also have benefits of lower rail rates which lake shippers in Buffalo do not have.

Judge TIMBERS, however, dissented, stating (pp 353-354):

> "It is undisputed on the record before us that a rate differential, unjustified by cost differences, has been shown. The Commission so found: 356 I.C.C. at 92. The precise issue therefore is whether the railroads can justify charging twice as much to transport wheat over a rail route that connects with a water carrier than over the competing rail route that connects with another railroad, despite the fact that the rail revenue yield on the water-rail route is substantially higher than the yield on the competing rail route."

Judge TIMBERS also stated that the Commission's finding with respect to Chicago demonstrates that the discriminatory rail rates are not justified and are unlawful under section 3(4) and he would have directed the Commission to enter an order

*This discrimination was not raised by any of the parties.

cancelling the rates being challenged. Admittedly, such action would, as he stated, be "strong medicine", but in view of the "flagrant violation" of the Act "disclosed by the undisputed record before us" he was of the belief that such was the medicine to be prescribed.

A petition for rehearing was filed, and the Court by order dated October 3, 1979 (Appendix D) posed six questions to be answered at the rehearing. The following are the questions and the summaries of the answers provided by the State:

> "1. *Who are the lake carriers, if any, in this proceeding and how are they being discriminated against?*"

The S & E Shipping Corporation, a lake carrier, is protected by section 3(4) and is discriminated against. The State of New York has an interest in protecting its citizens from unlawful, discriminatory and prejudicial rates proposed by the Commission. The discrimination is that ConRail charges twice as much per mile when it connects with the lake carriers at Buffalo than when it connects with another railroad.

> "2. *Is the 40-cent rate from Buffalo to Martins Creek discriminatory and if so, how?*"

The 40-cent rate was not subject to the Commission's investigation and hence, was not attacked as discriminatory, *per se*. It is a part of the discriminatory rate structure that results from the proposal subject to investigation which was designed to capture traffic moving over the lake-rail route. This was done by lowering the all-rail route from Twin Ports and Twin Cities to Martins Creek and at the same time holding the lake-rail route up to a level that assured that traffic would be diverted from it to the all-rail route. The ConRail offers a lower rail rate at Chicago than when it connects with lake carriers at Buffalo and this disparity is prejudicial and discriminatory and prohibited by the Interstate Commerce Act.

> "3. *Are there other issues than the summer rates?*"

Only the summer rate is in issue.

"4. *Is there any question that the all-rail rates from the grain sources to Martins Creek are not proper?*"

Petitioner contends that the all-rail rate, which was subject to the investigation, is prejudicial and discriminatory.

"5. *What effect, if any, does the transhipment of grain at Buffalo from lake to rail have on the over-all rates from source to Martins Creek?*"

The overall level of the lake-rail rates is not an issue in the proceeding. The relevance of the Buffalo to Martins Creek rail rate is to show that the all-rail rate is discriminatory because the railroad charges twice as much to transport wheat per ton-mile when it connects with a lake carrier at Buffalo as it does when it connects with an all-rail carrier at Chicago.

"6. *What is ConAgra's position with respect to the respective lake-rail, all-rail transportation rates?*"

ConAgra's position is not relevant since the fact that a shipper benefits from a discriminatory rate structure does not justify the discrimination.

The order of October 3, 1979 also contained the following:

"No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo. Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek.

"* * * To S & E Shipping Corp. the Commission was 'to decide if there was discrimination, at Buffalo, not with the Chicago connection. . . .' (S & E Petition p. 3).

"However, the Buffalo-Martins Creek rate is not *per se* determinative of discrimination but only as related to the total rates from grain source to Martins Creek via lake-rail or all-rail methods of transportation. We had assumed that this Court was being asked 'to order the cancellation of the unti-train [sic] rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable.' "

After reargument both the majority and the minority adhered to the May 7, 1979 decision and order, 600 F2d 349 (see order dated January 31, 1980; Appendix "F").

REASONS FOR GRANTING THE WRIT

Lake carriers connecting with railroads at Buffalo are entitled to protection under section 3(4). This is so even though there is no connecting point at Buffalo on the competing all-rail route. The Court of Appeals for the Second Circuit so held in the first decision in this matter (*State of New York v United States*, 568 F2d 887, 897 [1977]). There the Court remanded the case to the Commission "for the limited purpose of determining whether the proposed rates discriminate against lake carriers as connecting lines". (898)

In the decision below (600 F2d 349, 350 [1979]), the Court again noted that the case was sent to the Commission to determine whether the discrimination existed and the Commission found that the proposed rates are not discriminatory. Judge Timbers stated, in his dissent, that the precise issue here is whether a railroad can justify "charging twice as much to transport wheat over rail route that connects with a water carrier than over a competing railroad that connects with another railroad" (353-354). As the Commission noted the protestants' position was that there is a *prima facie* case under section 3(4) which shifts the burden to the railroad to justify a disparity in rates (see *Western Pacific Railroad Company v United States*, 263 F Supp 140 [N.D. Cal. 1966]);* and that the Commission's justification of the disparity was the following:

> "In our view the evidence is convincing that the establishment of a new unit-train service over Buffalo would be inefficient, uneconomical, and counter-productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines. 356 I.C.C. at 92. (JA, p. 182]."

*Decision by District Court as a result of remand (382 US 237).

The dissenting opinion by Judge Timbers answers this as follows:

> "The crux of the Commission's error is that, rather than making a determination of the discrimination issue on the basis of existing actual conditions on the Buffalo-Martins Creek run (which was the clear import of our remand), it has come up with a decision based on a hypothetical new unit-train service (which is totally beyond the scope of our mandate). In short, the Commission simply has not made the determination required by our mandate." (600 F2d 349)

In its order of October 3, 1979, after posing six questions to be answered by the parties, the Court below stated:

> "Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek." (Appendix "D")

Thus, after advising the protestants not to argue the question of the new 50-car unit trains, apparently because it was irrelevant, the majority adhered to its prior holding to the contrary which supported this position of the Commission that there is no discrimination based on this hypothetical new train unit. The Commission's position was that the establishment of a new unit train service would be inefficient, uneconomical and counter-productive.

To support the disparity in rates for transportation from Buffalo to Martins Creek against the all-rail transportation, it was incumbent on the Commission to find that such a disparity existed in the cost of transportation from Buffalo to Martins Creek as against the all-rail route. The record does not support such a finding and would not, even if a disparity were established, justify a rate twice as high per ton-mile for transporting wheat from Buffalo to Martins Creek as against the all-rail route. The railroads had the burden to and failed to establish that the disparity in rates was justified (*Seatrain Lines, Inc. v United States*, 233 F Supp 199, 209 [DNJ, 1964]). It is conceded

that the railroad earns twice as much per mile-ton after expenses from its Buffalo to Martins Creek rate as from its Chicago to Martins Creek rate. The rate disparity here, rather than being justified by the record, is clearly not justified.

The majority in the decision below stated that the Commission found that chaotic conditions existed in Buffalo causing delays and further that Buffalo lacked elevated storage facilities capable of accommodating three consecutive fifty-car trainloads of grain. The argument at best might be a reason for service disparity between Buffalo and Chicago, but not for discriminatory rates. Rate discrimination is a subject separate and apart from service discrimination. Rate discrimination must be justified on the basis of cost of transportation. Here, the evidence submitted by the railroads does not justify rate discrimination.

In *Interstate Commerce Commission v Mechling*, 330 US 567, 576 (1947), the Court stated that the declared policy of the Act requires that it must be so administered as to recognize and preserve inherent advantages of all modes of transportation. The need, which is in the public interest, is to maintain adequate and efficient water transportation service. Section 3(4), by including water carriers within the definition of connecting carriers, was intended for their protection. In *Mechling*, the Court said:

> "Carrier of ex-barge grain by eastern roads may conceivably entail more service and therefore greater costs than are involved in carrying ex-rail or ex-lake grain. If so, the eastern roads may, in certain circumstances, be justified in receiving an extra charge for that extra service wherever it is rendered. But the extra service must fit the extra charge and *cannot justify lump sum rate increases which cut into the inherent advantage of cheaper barge transportation which Congress intended to guarantee to shippers.*" (at 581) (Emphasis supplied.)

Thus, *Mechling* stands for the proposition that a disparity in rates between water carriers and rail carriers must be based on a disparity in costs.

The record does not disclose that the railroads' costs for transportation from Buffalo to Martins Creek per ton-mile is higher than that on the all-rail route. The record discloses that the rate for transportation from Buffalo to Martin Creek is .1176¢ per ton-mile while from Twin Ports to Martins Creek is .0524¢ per ton-mile and Chicago to Martins Creek is .0516¢ per ton-mile.

The State of New York suffers as a result of this discrimination in that the discrimination affects the economic life of the City of Buffalo and its labor forces. The Commission justifies its rate disparity on the finding that unit train service from Buffalo to Martins Creek is inefficient (as pointed out before the protestants were told not to argue this question). This finding might sustain a ruling that the service provided at Buffalo be different from that at Chicago, but in no way does it relate to, or affect the costs of rail transportation at either place. It therefore does not justify the rate disparity. Judge TIMBERS covered this question clearly in his dissent below (p. 354):

> "While the Commission on remand purported to give lip-service to the Supreme Court's holding in *Western Pacific Railroad Co., supra,* 356 I.C.C. at 92, its decision to permit the railroads to maintain a rail rate structure which discriminates against water carriers at Buffalo is grounded upon the following one-sentence finding:
>
> "In our view the evidence is convincing that the *establishment of a new unit-train service* over Buffalo would be inefficient, uneconomical, and counter-productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines." 356 I.C.C. at 92. (emphasis added).
>
> Such a finding, based not on *existing actual conditions,* but on a *hypothetical new unit-train service,* most assuredly does not comply with our mandate. And I fail to see any support for it in the Supreme Court's test set forth in *Western Pacific Railroad Co., supra.*

> The railroads, in my view, have totally failed to justify the undisputed rate discrimination which has been found, permitting ConRail to earn roughly twice as much, *after expenses*, from its Buffalo-Martins Creek route as from its Chicago-Martins Creek route."

Western Pacific Railroad v United States, 382 US 237, 246 (1965), after holding that connecting line status did not necessitate physical connection between carriers for coverage, held that the elimination of discriminatory treatment where it exists, is required. The Commission in fact did find there was discrimination between lake-rail traffic and all-rail traffic, but remedied it by providing for correction of the rates from Chicago to Martins Creek. In the order of October 19, 1979, the Court below discounted this, saying:

> 'No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo."

Overcoming discrimination at the Port of Chicago in no way helps the Port of Buffalo. The lake carriers who have equipment at Buffalo are not helped by the end of discrimination at Chicago nor are Buffalo's economic conditions and its labor problems benefited by the correction of the Chicago discrimination. The Commission's having found that there was discrimination in the rates from Chicago to Martins Creek should have also found that this discrimination existed at Buffalo, in the absence of proof of higher costs for transportation out of Buffalo. Disparity in rates for Buffalo can only be justified if it can be shown there is a disproportionately extra cost in shipping grain out of Buffalo. The record does not sustain this.

It is essential to the shippers and the people of Buffalo that this alternate method of transportation by lake and rail be kept viable. So long as it is viable, the public can hope for reasonable rates. The very fact that the winter rates, when there is no lake carrying service, are higher than in summer when their lake service is available, presages what would happen if lake carrying services were to disappear.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
April , 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224
Telephone (518) 474-7173

SHIRLEY ADELSON SIEGEL
Solicitor General,
State of New York

JEREMIAH JOCHNOWITZ
Assistant Solicitor General,
State of New York
of Counsel

APPENDIX

APPENDIX A

(Decision of the United States Court of Appeals)

Entered in the Office of the Clerk of the United States Court of Appeals for the Second Circuit on March 2, 1977 (568 F2d 887 [1977]).

STATE OF N.Y. v. UNITED STATES

Cite as 568 F.2d 887 (1977)

STATE OF NEW YORK, Petitioner, and S & E Shipping Corporation, Intervenor,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents, and Commonwealth of Pennsylvania et al., Intervenors.

No. 212, Docket 76-4085.

United States Court of Appeals, Second Circuit

Argued Nov. 8, 1976. Decided March 2, 1977. Rehearing Denied June 6, 1977. Rehearing En Banc Denied June 6, 1977.

On petition to review an order of the Interstate Commerce Commission, 351 I.C.C. 470 (1976), approving unit train rates on wheat, the Court of Appeals, Timbers, Circuit Judge, held (i) that 60 day period for filing review petition was not to be measured from date of service of order denying request for reconsideration of initial decision approving three of the four interrelated rates; (ii) that Great Lakes carriers were entitled to avail themselves of Interstate Commerce Act's prohibition against discrimination between connecting lines notwithstanding that their carriage of wheat in bulk exempted them from regulation; (iii) that the water carriers, which transported wheat from the same midwestern points to port of Buffalo, New York (which port also was served by one of the unit train railroads and at which inter-

change of water-rail traffic could be and was effected) were "connecting lines" within meaning of antidiscrimination provision of the Act; and (iv) that neither port of Buffalo nor Buffalo flour milling interests were unduly prejudiced by failure to publish a unit train rate to Buffalo that was competitive with the water-competitive rates made available to the Martins Creek miller by rail during Great Lakes shipping season.

Petition granted; order affirmed in part and set aside in part; and case remanded in part.

1. Commerce 157

Petition to review a final order of Interstate Commerce Commission must be filed within 60 days of the entry of the order; timeliness requirement is jurisdictional. 28 U.S.C.A. §2344.

2. Commerce 157

Timeliness of petition to review order of Interstate Commerce Commission approving certain "unit train rates" for transportation of wheat was not measured by reference to date of service of order denying request for reconsideration of initial decision approving three of the four rates since rates were interrelated and not independent tariffs, Commission viewed the proceeding as still pending as a whole and in its final report and order discussed all the rates, in any event, it would have been judicially imprudent to review the initial order piecemeal while the proceedings as a whole remained pending; furthermore, respondent failed to show prejudice. 28 U.S.C.A. §§2342(5), 2343, 2344; Interstate Commerce Act, §17(7), 49 U.S.C.A. §17(7).

3. Commerce 133

Under provision of Interstate Commerce Act that an appellate division of the Interstate Commerce Commission is empowered to reverse, change, or modify the original decision "in any

respect" the appellate division is not limited to the issues on which reconsideration is granted; Commission can exercise continuing jurisdiction to suspend, reconsider or modify its orders even absent a petition for reconsideration. Interstate Commerce Act, §17(7), 49 U.S.C.A. §17(7).

4. Administrative Law and Procedure 704

Deeply rooted policy of federal courts is against piecemeal appeals and in favor of allowing administrative proceedings to run their course without judicial interference.

5. Federal Courts 595

Grant of summary judgment as to fewer than all claims or parties is not a final, appealable judgment unless the district court determines that there is no just reason for delay. Fed. Rules Civ. Proc. rule 54(b), 28 U.S.C.A.

6. Administrative Law and Procedure 704

Filing of "protective" petitions for judicial review at various points preceding completion of administrative proceedings should not be encouraged.

7. Commerce 156

Although claim that Interstate Commerce Commission's order approving certain "unit train rates" for transportation of wheat failed to protect certain lake carriers against allegedly discriminatory and prejudicial rail rates was not included in protestant's petition for reconsideration such fact did not preclude judicial review since question whether proposed rates were discriminatory against connecting line was presented to the Commission and expressly rules on its initial decision; since court had benefit of Commission's views and since a petition for reconsideration is not a prerequisite to judicial review, Court of Appeals would consider the issue. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4); 5 U.S.C.A. §704.

8. Carriers 32(2¼)

Shipper routing exception to Interstate Commerce Act's prohibition on discrimination between connecting lines is designed to protect a railroad against charges of undue prejudice when reasons for not giving certain traffic to a particular connecting line is that the carrier is following a shipper's instructions to route traffic to another connecting line; exception does not provide a defense to a charge of rate discrimination and was not applicable to claim that unit train rates for transportation of wheat from points in the midwest discriminated against connecting Great Lakes carriers. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4).

9. Carriers 32(1)

Just because a water carrier is exempt from regulation when it transports commodities in bulk does not mean that it is not subject to part III of Interstate Commerce Act for purposes of protection under provision of Act prohibiting discrimination between connecting lines. Interstate Commerce Act, §§3(4), 301 et seq., 49 U.S.C.A. §§3(4), 901 et seq.

10. Carriers 32(1)

Great Lakes water carriers, which held certificates of public convenience and necessity, were entitled to protection of Interstate Commerce Act's prohibition on discrimination between connecting lines, as regards unit train rates for transportation of wheat from points in the midwest to Martins Creek, Pennsylvania, notwithstanding that their carriage of wheat in bulk exempted them from regulation. Interstate Commerce Act, §§3(4), 303(b), 49 U.S.C.A. §§3(4), 903(b).

11. Carriers 32(1)

Fact that all rail route for unit train transportation of wheat from points in the midwest to Martins Creek, Pennsylvania, did

not reach Buffalo, New York, which is the terminus of lake transportation of rail-lake carriage of wheat between the same points, did not mean that the Great Lakes carriers were not "connecting lines" subject to protection of Interstate Commerce Act against discrimination between connecting lines; rather, lake carriers were "connecting lines" since they served a point also served by the railroad, i.e., Buffalo, at which point there was a direct physical connection between the rail and lake carriers. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4).

See publication Words and Phrases for other judicial constructions and definitions.

12. Carriers 32(1)

A common point of interchange is not a prerequisite to applicability of provision of Interstate Commerce Act prohibiting discrimination between connecting lines; however, in case of discrimination against water carriers it is not the law that the rail and water interchanges need only be located on the same route; rather, a water carrier serving a point also served by a railroad is a "connecting carrier" if interchange of traffic can be effected. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4).

See publication Words and Phrases for other judicial constructions and definitions.

13. Commerce 156

Contention that failure of railroad participating in unit train transportation of wheat from points in the midwest to Martins Creek, Pennsylvania to provide unit train rates from Buffalo, New York, terminus of water-rail shipments of wheat from the same points to Martins Creek, was prejudicial to Great Lakes carriers would not be ruled on by reviewing court where the argument was not presented to Interstate Commerce Commission for consideration in connection with its initial order or

order from any petitions for reconsideration and there were no exceptional circumstances requiring consideration despite failure to present arguments to the Commission. Interstate Commerce Act, §3(1), 49 U.S.C.A. §3(1); 28 U.S.C.A. §§2342(5), 2343, 2344.

14. Carriers 32(2¼)

Failure to make available to Buffalo, New York unit train rates applicable to shipments of wheat from points in the midwest to Martins Creek, Pennsylvania during shipping season on the Great Lakes was not unduly prejudicial to the Buffalo interests, notwithstanding that open season rate to Martins Creek was water-competitive; claim of undue prejudice was particularly weak since open season unit rate to Martins Creek is about 68% higher than unit train rate available to Buffalo and, because of difference in rail distances, unit rates to Buffalo are less expensive per mile than unit rates to Martins Creek; furthermore, Buffalo has available the original water rate. Interstate Commerce Act, §3(1), 49 U.S.C.A. §3(1).

Patrick McEligot, Washington, D.C. (Louis A. Lefkowitz, Atty. Gen., Ruth Kessler Toch, Solicitor Gen., State of New York, Albany, N.Y., Bryce Rea, Jr., Leo C. Franey, and Rea, Cross & Knebel, Washington, D.C., on the brief), for petitioner State of New York.

Robert J. Ables, Washington, D.C. (Arthur N. Chagaris, Washington, D.C., on the brief), for intervenor S & E Shipping Corp.

Hanford O'Hara, Assoc. Gen. Counsel, I.C.C., Washington, D.C. (Thomas E. Kauper, Asst. Atty. Gen., Lloyd John Osborn, Atty., Dept. of Justice; Robert S. Burk, Acting Gen. Counsel, I.C.C., Washington, D.C., on the brief), for respondents United States and Interstate Commerce Commission.

Appendix A
(Decision of the United States Court of Appeals)

C. Harold Peterson, Minneapolis, Minn., and Peter A. Greene, Washington, D.C. (Louis A. H. Pepper, New York City, on the brief), for intervenors Soo Line Railroad Co. and ConAgra, Inc.

Robert P. Kane, Atty. Gen., Commonwealth of Pennsylvania; Edward J. Morris, Counsel, John B. Wilson, Asst. Counsel, Pennsylvania Public Utility Commission, Harrisburg, Pa.; Gordon P. MacDougall, Spec. Asst. Counsel, Washington, D.C., filed a brief for intervenors Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission.

Before HAYS, ANDERSON and TIMBERS, Circuit Judges.*

TIMBERS, Circuit Judge:

On this petition to review, petitioner State of New York (New York) challenges an order of the Interstate Commerce Commission (the Commission), 351 I.C.C. 470 (1976),[1] which approved certain "unit train rates" of two railroads for the transportation of wheat from points in the midwest to Martins Creek, Pennsylvania.

The essential questions presented by the petition to review are (1) whether the Commission's order failed to protect certain lake

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*Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Judges Anderson and Timbers who are in agreement on this opinion. Judge Hays heard argument on November 8, 1976, but has not had an opportunity to participate further in the case because of temporary illness.

[1]The Commission's final order of January 27, 1976, 351 I.C.C. 470, which is the subject of the instant petition to review, as well as the Commission's initial order of June 18, 1974, 346 I.C.C. 814, were both entered in the Commission's Investigation and Suspension Docket No. 8899, *Unit Train Rates on Wheat, Minn. & Wis. To Martins Creek, Pa.*

Both orders were entered by Division 2 of the Commission. The final order was entered by Division 2 acting as an Appellate Division. In the interest of brevity we refer throughout this opinion to "the Commission", unless otherwise specified.

carriers against allegedly discriminatory and prejudicial rail rates in violation of §3(4) of the Interstate Commerce Act (the Act);[2] and (2) whether the Commission's order failed to protect the lake carriers, the Port of Buffalo and other Buffalo interests against such rail rates which allegedly would divert wheat traffic away from Buffalo in violation of §3(1) of the Act.[3] A further question with respect to this Court's jurisdiction is raised by respondents' motion partially to dismiss the petition to review for lack of timeliness.

For the reasons below, we hold that we have jurisdiction to review the order of the Commission; we affirm the Commission's

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[2]Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4) (1970), provides:

> "All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

[3]Section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1) (1970), provides:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

order that the proposed rates do not violate §3(1) of the Act; but, with respect to the §3(4) claim, we set aside the order and remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

I. FACTS AND PRIOR PROCEEDINGS

After the Commission's initial report and order of June 18, 1974, 346 I.C.C. 814 (1974), the State of New York was granted leave to intervene to consolidate and represent various New York interests which had opposed the proposed rates in question. New York's position on the instant petition to review is supported by intervenor S&E Shipping Corporation.

Respondents are the United States and the Commission. Their position is supported by intervenors Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Soo Line Railroad Company (Soo) and ConAgra, Incorporated (ConAgra). Soo and Erie Lackawanna Railway Company (Erie), supported by ConAgra, were the original proponents of the proposed rates.[4]

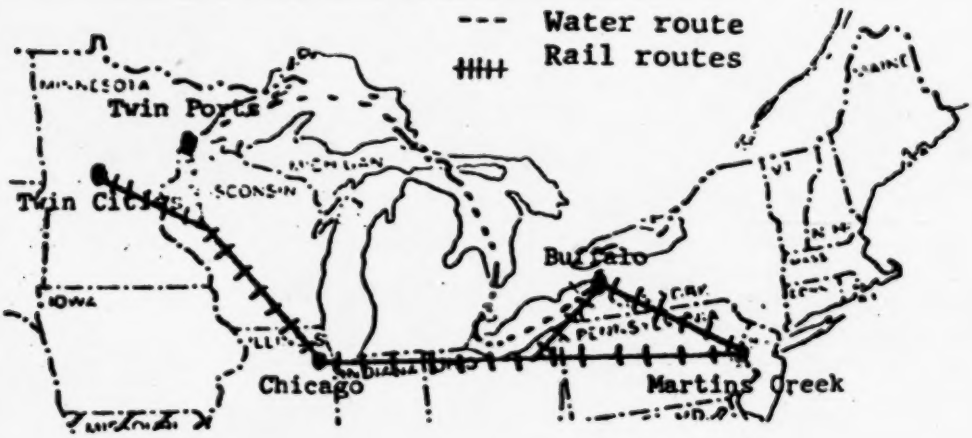
The proceedings before the Commission involved proposed unit train rates[5] on wheat transported in bulk over an all rail route

[4]The rates went into effect on June 1, 1974. By the time of the Commission's initial decision, the rates had increased. For convenience the Commission continued to refer to the rates as "proposed" even though they were in effect and it used the figures applicable to the rates as originally proposed. 346 I.C.C. at 815-16. We shall do the same in this opinion.

[5]Unit train rates generally "provide for the movement of a train comprised of shipper — or consignee — owned cars from one specified loading point to one consignee at one specified destination, and the return of the empty cars to the same origin at a specified rate per ton." *Lake Carriers' Association v. United States*, 399 F.Supp. 386, 388-89 (N.D. Ohio 1975). Unit train rates are to be distinguished from trainload and carload rates. The unit train system is a form of shuttle, here between the midwest loading points and the shipper's plant at Martins Creek. The cars in this case are not owned by the shipper, ConAgra, but by Soo.

from Minneapolis and St. Paul, Minnesota (Twin Cities) and Duluth, Minnesota, and Superior, Wisconsin (Twin Ports), to Martins Creek, Pennsylvania. The shipper, ConAgra, has its mill at Martins Creek.[6]

The following straight line diagram shows the rail routes as well as the lake route referred to below:



The proposed rates are summer and winter rates from Twin Ports and Twin Cities to Martins Creek. Soo carries the wheat from the points of origin to Chicago. Erie carries the wheat from Chicago to Martins Creek.

The summer rate from each point of origin (72.25 cents per hundredweight) is the lower rate. It applies during the season when the Great Lakes are open to navigation by lake carriers. It

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[6]ConAgra seems to be regarded as something of an upstart by the milling industry for locating its operation at Martins Creek rather than at Buffalo, which is considered the milling capital of the East. ConAgra chose to locate at Martins Creek in order to be closer to the bakeries in the East Coast markets in New York, New Jersey and Pennsylvania. It is to these markets that ConAgra ships its flour by motor carrier and the Buffalo millers ship their flour by rail.

is designed to compete with rates on the lake-rail route from Twin Ports to Buffalo by lake carrier and thence by rail to Martins Creek.

The winter rate is higher (88 cents per hundredweight). It applies only during the season when the Great Lakes are closed to navigation. It is designed to compete with rates on an all rail route, used by shippers when the Great Lakes are closed, from Twin Ports and Twin Cities via Buffalo to Martins Creek.

The proposed rates were protested by various shipper, port, carrier, and community interests.[7] By an order dated October 31, 1973, the Commission instituted an investigation of the lawfulness of the rates and suspended their operation through May 31, 1974. The Commission's initial order of June 18, 1974, 346 I.C.C. 814, found the summer and winter rates from Twin Ports and the winter rate from Twin Cities to be lawful; but it found the summer rate from Twin Cities to be unduly preferential to Twin Cities and unduly prejudicial to Twin Ports in violation of §3(1) of the Act.[8]

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[7]The protestants included, among others, lake carriers, milling companies, groups representing various Buffalo interests, and the Penn Central Transportation Company.

[8]The Commission found the Twin Cities summer rate unlawful because it was the same as the Twin Ports summer rate (72.25 cents) and did not include the cost of transporting wheat from Twin Cities to Twin Ports. The latter cost would make transportation from Twin Cities more expensive if the wheat were being transported by lake carrier to Buffalo. The Commission held that the parity of rates between Twin Ports and Twin Cities, during the season when the rail rates were supposed to be competitive with lake rates, was unduly preferential to Twin Cities and unduly prejudicial to Twin Ports in violation of §3(1). "A lawful rate from the preferred origins would be 88 cents which is substantially the product [sic] of the local 15-cent rate from Twin Cities to Twin Ports and the proposed 72.25 cent rate beyond." 346 I.C.C. at 855.

Following the Commission's initial order, New York was granted leave to intervene as stated above. Both sides thereupon filed petitions for reconsideration. On June 27, 1975, the Commission denied reconsideration of its order with respect to the three rates it had approved; but it granted reconsideration of its order with respect to the unlawfulness of the Twin Cities summer rate and "reopened [the proceeding] on the present record." Meanwhile, all four rates remained in effect. Upon reconsideration, the Commission issued its final order of January 27, 1976, 351 I.C.C. 470, affirming the lawfulness of the three approved rates and reversing its prior finding that the Twin Cities summer rate was unlawful. In short, all rates were approved and the investigation was discontinued.

It is the Commission's final order of January 27, 1976 to which the instant petition to review is addressed, invoking the jurisdiction of this Court under 28 U.S.C. §2342(5) (Supp. V., 1975) *amending* 28 U.S.C. §2343 (1970). New York seeks to have the summer and winter rates from both Twin Ports and Twin Cities declared unlawful on the ground that they violate §§3(1) and 3(4) of the Act.

II. JURISDICTION

Before turning to the merits of the petition to review, we are presented with a threshold question with respect to this Court's jurisdiction. The Commission and intervenors Soo and ConAgra (referred to as "respondents" in this section of our opinion) claim that, because of the asserted lack of timeliness of the petition to review, we have jurisdiction to review only the Twin Cities summer rate, not the other three rates. We disagree.

[1] It is common ground that a petition to review a final order of the Commission must be filed within sixty days of the entry of the order, 28 U.S.C. §2344 (1970), and the timeliness requirement

is jurisdictional. See, e.g., *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 & n.24 (D.C. Cir. 1974).

[2-6] Respondents argue that the sixty day period began to run on August 5, 1975, the date of service of the Commission's June 27, 1975 order. That order denied petitioners' request for reconsideration of the Commission's initial decision of June 18, 1974 which approved three of the four rates here in question. Respondents contend that the denial of reconsideration was a final order with respect to the three rates which earlier had been approved, in that the denial of reconsideration "impose[d] an obligation, den[ied] a right, or fix[ed] some legal relationship as a consummation of the administrative process." *C & S Air Lines v. Waterman Corp.*, 333 U.S. 104, 113 (1948); see *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied sub nom. Federal Maritime Board v. United States*, 347 U.S. 990 (1954). Respondents stress particularly that "a final order need not necessarily be the very last order." *Isbrandtsen Co. v. United States, supra*, 211 F.2d at 55.

Respondents' argument would be persuasive if all the petitions for reconsideration had been denied in all respects. Respondents contend that the order of June 27, 1975 terminated the proceedings as to all but the Twin Cities summer rate as completely as if the Commission had not agreed to reconsider that rate. Whatever might be said as to this theoretical contention, it wholly ignores the essential nature of the proceedings. The rates were proposed as an interrelated set of rates, not as independent tariffs. Although the Commission denied reconsideration of the three rates previously approved and granted reconsideration of the one previously disapproved, all four rates continued in effect pending reconsideration. The rate initially found to be unlawful was not cancelled, and new schedules were not filed.

Moreover, the Commission itself seems to have viewed the proceeding as still pending as a whole, notwithstanding its denial of reconsideration. In its final report and order of January 27, 1976, it discussed all the rates and affirmed and adopted the conclusions previously made with respect to the three rates as to which reconsideration technically had been denied. This was necessary because the Twin Cities summer rate was tied to the Twin Ports summer rate.[9]

As a practical matter, it would have been judicially imprudent for us as a reviewing court to consider piecemeal the initial order while the proceeding as a whole remained pending before the Commission. Indeed the Commission acknowledges in its brief before us that "[s]hould a court action be commenced under these circumstances, the Court could, in its discretion, decide to stay proceedings pending completion of the ancillary administrative proceedings." That hardly comports with our view of finality.

Even assuming that petitioners could have filed a petition to review the order approving three of the four rates immediately

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[9]Under §17(7) of the Interstate Commerce Act, 49 U.S.C. §17(7) (1970), an appellate division of the Commission is empowered to reverse, change, or modify the original decision "in any respect". The appellate division apparently is not limited to the issues on which reconsideration was granted. The Commission can exercise "continuing jurisdiction to suspend, reconsider or modify its orders . . . even in the absence of a petition for reconsideration . . . ." *Resort Bus Lines, Inc. v. ICC*, 264 F.Supp. 742, 745 (S.D.N.Y. 1967) (three-judge court) (Kaufman, *J.*).

This power to reconsider the entire record is exemplified by the proceedings below. In its final report and order, the Commission discussed the Twin Ports rates as well as the Twin Cities summer rate. It identified the rates in issue as those from Twin Ports and Twin Cities at both the summer and winter levels, recited the arguments against all the rates, and specifically adopted the prior findings and conclusions as to the Twin Ports rates in order to extend them to the Twin Cities summer rate. 351 I.C.C. at 471, 473, 478-79. In conclusion it stated: "Upon reconsideration, we find the proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek to be just and reasonable and not otherwise unlawful." *Id.* at 479. Despite its earlier denial of reconsideration, the Commission appears to have reconsidered all four rates.

after denial of their petition for reconsideration, a point upon which we express no view, we are satisfied that they were justified in awaiting the outcome of the proceeding as a whole. Respondents have not shown that they were prejudiced by the passage of time. Especially in view of the deeply rooted policies of the federal courts against piecemeal appeals and in favor of allowing administrative proceedings to run their course without interference from the courts, we hold that the instant petition to review was timely with respect to the four rates in question.[10]

III. SECTION 3(4) CLAIM

[7] Turning to the merits of the petition to review, we shall consider first the claim that the Commission's order failed to protect certain lake carriers against allegedly discriminatory and prejudicial rail rates in violation of §3(4) of the Act.[11]

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[10]By analogy, a grant of summary judgment as to fewer than all claims or parties is not a final, appealable judgment unless the district judge determines that there is "no just reason for delay" pursuant to Fed.R.Civ.P. 54(b). See, e.g., *Melancon v. Insurance Co. of North America*, 476 F.2d 594 (5 Cir. 1973) (per curiam); 9 Moore's Federal Practice ¶110.07, at 108 n. 6 (Supp. 1975).

We see no reason to encourage the filing of "protective" petitions for judicial review at various points preceding completion of administrative proceedings. See generally *Outland v. CAB*, 284 F.2d 224, 228 (D.C. Cir. 1960).

[11]We reject respondents' contention that this issue is not properly before us. Although neither New York nor the Lake Carriers' Association (one of the original protestants) included this claim in their petitions for reconsideration, that does not preclude our review of the issue under *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952). In *Tucker* the point urged on review had never been presented to the administrative agency. Here the question whether the proposed rates are unlawful under §3(4) was presented to the Commission and was expressly ruled upon in the initial decision of June 18, 1974. 346 I.C.C. at 852. We have the benefit of the Commission's views on the issue. See *Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 238, 239 (9 Cir. 1969); *Lake Carriers' Association v. United States*, *supra*, 399 F.Supp. at 395-96. Under the circumstances, and especially since a petition for reconsideration by the agency is not a prerequisite to judicial review, §704 of the Administrative Procedure Act, 5 U.S.C. §704 (1970), we shall consider the issue.

Section 3(4) prohibits carriers from "discriminat[ing] in their rates, fares, and charges between connecting lines. . . ." The term "connecting line" as used here means "the connecting line of any carrier subject to the provisions of [part I] or any common carrier by water subject to [part III]."

The Commission did not reach the question whether the proposed unit train rates discriminate against the lake carriers because it found that the lake carriers are not entitled to the protection of §3(4). 346 I.C.C. at 852. The Commission ruled that the lake carriers are outside the scope of the protection of §3(4) because "[s]o far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4)." The Commission also ruled that the lake carriers are not "connecting lines" within the meaning of the statute.

[8] We hold that the Commission erred with respect to both branches of its §3(4) ruling.[12]

(A) *Exempt Water Carriers Are Entitled to Section 3(4) Protection*

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[12]Respondents now suggest a third ground for denying the lake carriers the protection of §3(4), namely, that the proposed rates are not covered by that section because the traffic is "specifically routed" to the all rail route by the shipper, ConAgra, and therefore comes within the statute's exception for specifically routed traffic. Aside from being a *post hoc* rationalization for agency action, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), the argument misinterprets the statutory language. The shipper routing exception to §3(4) is designed to protect a railroad against charges of undue prejudice when its reason for not giving certain traffic to a particular connecting line is that it is following a shipper's instructions to route the traffic to another connecting line. The exception does not provide a defense to a charge of rate discrimination. Were this not so, §3(4) would be a dead letter, for shippers obviously would be willing to route traffic in order to avail themselves of lower rail rates.

The basis of the Commission's ruling on this issue is unclear. Its ruling and supporting reasoning is confined to the following two sentences:

> "Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4)." 346 I.C.C. at 852.

Intervenor Soo, in its brief before us, argues that the Commission meant that there was no evidence in the record that the protesting lake carriers are subject to part III of the Act. The Commission, however, was fully aware that some water carriers on the Great Lakes are subject to Part III.[13]

[9] We interpret the Commission's ruling on this issue to mean that carriers exempted from regulation when they carry commodities in bulk[14] are not "subject to part III" for purposes

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[13]Included in the Certified Index to the Record is the protest originally filed on behalf of the Great Lakes Ship Owners Association and its individual members. Its opening sentence identifies the protestants as "common carriers by water holding certificates of public convenience and necessity issued under Part III of the Interstate Commerce Act ...." The Commission's own public records show that certificates were issued to the non-exempt carriers. Also included in the Certified Index to the Record is the protest of the Lake Carriers' Association, one of whose members is shown by the Commission's records to hold a certificate. Under these circumstances and in view of the importance of navigation on the Great Lakes, we cannot assume that the Commission was unaware that there are water carriers on the Great Lakes subject to Part III.

[14]Section 303(b) of the Interstate Commerce Act, 49 U.S.C. §903(b) (1970), in relevant part provides:

> "Nothing in this chapter [Part III of the Interstate Commerce Act, 49 U.S.C. §§901-23] shall apply to the transportation by a water carrier of commodities in bulk ...."

of protection under §3(4). We disagree. Just because a water carrier is exempt from regulation when it transports commodities in bulk does not mean that it is not subject to part III.[15]

[10] We hold that the water carriers here involved on the Great Lakes are entitled to the protection of §3(4) although their carriage of wheat in bulk exempts them from regulation under §303(b) of the Act. See *ICC v. Mechling*, 330 U.S. 567, 576 (1947) (Black, *J.*); *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 697 (1943) (Black, *J.*, dissenting) (an earlier proceeding which eventually led to the *Mechling* decision); *Valley Line Co. v. United States*, 390 F.Supp. 435, 438-39 (W.D.Pa. 1975) (three-judge court); *Seatrain Lines, Inc. v. United States*, 233 F.Supp. 199, 210 (D.N.J.1964) (three-judge court); *Atchison, Topeka & Santa Fe Ry. v. United States*, 194 F.Supp. 438 (D.Kan.1961) (three-judge court); *Arrow Transportation Co. v. United States*, 176 F.Supp. 411, 419 (N.D.Ala.1959) (three-judge court), *aff'd sub nom. State Corporation Commission v. Arrow Transportation Co.*, 361 U.S. 353 (1960) (per curiam).[16]

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[15]The Commission asserts in its brief that "[t]he only connecting carriers are Great Lakes water carriers which are *not* subject to Part III" and that "[t]his point is vigorously confirmed by S&E Shipping in its brief to this Court." What we find confirmed in S&E Shipping's brief is that the Commission cannot regulate water carriers carrying commodities in bulk; and that the Commission repeatedly has sought repeal of the §303(b) exemption, but not that this removes such water carriers from the protection of §3(4).

[16]Of these cases, only *Valley Line* explicitly discusses the issue. The question there was whether exemption from the terms of part III under §303(e) of the Act, 49 U.S.C. §903(e)(1), makes a carrier not "subject to part III" within the meaning of §5(2) of the Act, 49 U.S.C. §5(2), which, like §3(4), is in part I of the Act. *Valley Line* held that a water carrier exempt from part III nevertheless is entitled to the protection of §5(2), "relating to protection of the public interest with respect to mergers and concentration of control over carriers ...." 390 F.Supp. at 438. The court reasoned that, although the

Footnote continued on next page—

(B) *Meaning of "Connecting Line"*

[11, 12] The Commission ruled that, even if protestants were entitled to the protection of §3(4), there would be no merit to their argument. The Commission went on to state, "Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers." 346 I.C.C. at 852. In its brief before us, the Commission supplemented this with the following explanation: "The all-rail route here involved does not reach Buffalo, the point at which New York says its connection within the meaning of section 3(4) takes place. The fact that Erie serves Buffalo on other routes does not change this conclusion." We disagree.

—*Footnote continued from preceding page*

terms of §5(2), as defined in §5(13), 49 U.S.C. §5(13), protect water carriers "subject to chapter 12 of this title [part III of the Act]", exemption from part III does not mandate exclusion from the protection of §5(2) because the policies of part I "are of general importance, and quite distinct from the specific regulatory requirements with respect to water carriers established by part III. . . ."

While the other cases cited do not discuss the issue expressly, in all of them except the *Inland Waterways/Mechling* cases the courts applied §3(4) to invalidate rail rates that discriminated against water carriers transporting commodities in bulk. The bulk commodity in all the cases except *Seatrain* was grain.

Mechling was decided under §307(d) of the Act, 49 U.S.C. §907(d) (1970). But in a general discussion of the legislative history of the Transportation Act of 1940, which added part III to the Act and extended §3(4) to water carriers, the Court noted by way of dictum that "§3(4) of the pre-existing Act . . . was amended by the 1940 Act specifically to include water carriers, such as these barge lines, within the definition of connecting carriers." 330 U.S. at 576. As in the instant case, the barge lines in *Mechling* carried grain in bulk and therefore would have been exempted from part III. Mr. Justice Black, in his dissenting opinion in the earlier proceeding (*Inland Waterways*), stated that §3(4) *had* been violated. 319 U.S. at 671.

Respondents concede that a common point of interchange is not a prerequisite to the applicability of §3(4).[17] Rather, they argue that somewhere along the all rail route there must be a point of interchange with the water carrier. In other words, so the argument goes, the point need not be the same as the point of interchange with a connecting rail line, but the respective rail and water interchanges at least must be located on the same route. We decline the invitation to adopt this construction of the statute. Respondents have not cited any authority for their interpretation. Petitioner's interpretation, on the other hand, finds persuasive support in *Seatrain Lines, Inc. v. United States,*

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[17]To the extent that language in *Western Pacific Rys. v. United States*, 382 U.S. 237, 245-46 (1965), is to the contrary, we believe it can be explained by the particular facts and the concerns of the parties in that case. In *Western Pacific*, an intermediate carrier on a through route complained under §3(4) of discrimination by a railroad with which the complainant did not connect physically. Another railroad which had not complained linked the complainant to the allegedly discriminating railroad. The Court rejected the Commission's narrow construction which would have required a complainant itself to "make a direct connection with the discriminating carrier, or be part of a through route that already includes the carrier." 382 U.S. at 242. In order to make plain that the facts of that case satisfied the requirements of §3(4), the Court held "that to qualify as a 'connecting line', *in the absence of physical connection*, a carrier need only show that it participates in an established through route, *making connection at the point of common interchange*, all of whose participants stand willing to cooperate in the arrangements necessary to eliminate the alleged discrimination." *Id.* at 245 (emphasis added). The holding simply described the facts of the case and declared them to be sufficient to qualify the complainant as a "connecting line".

In the instant case there *is* a direct physical connection at Buffalo between the lake carriers and Erie. The Court's language about a point of common interchange, referring to the through route of which the non-connecting carrier in *Western Pacific* was a part, is inapplicable to this case, as respondents concede. Indeed, *Western Pacific* stands for the proposition that the term "connecting lines" in §3(4) should not be construed restrictively.

supra,[18] and in the Commission's own decision in *Ingot Molds, Ohio & Pa. to Cypress, Texas*, 349 I.C.C. 102 (1975).[19]

We hold, on the facts of this case, that the lake carriers are connecting lines, because they serve a point also served by the

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[18]In *Seatrain* the all rail route originated at Sandow, Texas. It had connections with other rail lines at Marjorie, Texas; Longview, Texas; Texarkana, Arkansas; and one of three alternate gateways to the East (St. Louis, Mo.; East St. Louis, Ill.; or Flinton, Ill.). It finally arrived at the shipper's aluminum fabricating plants at Cressona, Pa.

The rail-water-rail route also originated at Sandow, Texas, and arrived ultimately at Cressona, Pa. The first rail link was at Marjorie, Texas, as on the all rail route. Thereafter the routes diverged. The next connection was at Texas City, Texas, where the railroad cars were loaded aboard the water carrier for shipment to a port at Edgewater, New Jersey, whence they were carried by rail to Cressona.

Thus, in *Seatrain*, as in the instant case, there was no point of interchange with the water carrier along the all rail route. It was sufficient that the water carrier "connected" with the rail carrier, in the common sense meaning of that word.

[19]The parties sharply disagree in their interpretations of the *Ingot Molds* decision. There three routes were involved, two all rail and one barge-rail. There was an interchange between barge and rail lines on one of the all rail routes (at Houston, Texas) but not on the other all rail route. The Commission held that the complaining water carrier was a connecting line and that the railroads had violated §3(4). Respondents contend that the decision was based on the fact that the barge line interchanged with the rail line on one of the all rail routes. We believe the Commission would have reached the same result had there been only the two non-intersecting routes. The decision would be pointless if it meant that the railroads could continue to maintain discriminatory rates as long as they routed traffic over the none-intersecting all rail route (via Corsicana, Texas). See diagram at 349 I.C.C. 107. The Commission itself stated that the relevant "court decisions [make clear] that a water carrier serving a point also served by a railroad is a connecting carrier within the meaning of section 3(4) of the [A]ct if interchange of traffic can be effected . . . ." *Id.* at 111; see also *id.* at 112. See generally *Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex.*, 326 I.C.C. 511 (1966), 332 I.C.C. 540 (1968), *aff'd sub nom. Atchison, Topeka & Santa Fe Ry. v. United States*, 300 F.Supp. 1351 (N.D. Ill. 1969) (three-judge court).

railroad so that interchange at that point can be, and in fact is, effected. See note 19 *supra.*

(C) *Discriminatory Rates*

The Commission, having decided that the lake carriers are not "connecting lines" within the meaning of §3(4), and that they would not be protected by that section even if they were, did not reach the question whether the rates were discriminatory.[20] We therefore remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

IV. SECTION 3(1) CLAIM

Petitioner claims that the Commission erred in failing to protect the lake carriers, the Port of Buffalo and other Buffalo interests from prejudicial and discriminatory rail rates and practices allegedly designed to divert wheat traffic away from Buffalo in violation of §3(1) of the Act. Petitioner's argument in support of this claim is in two branches, one of which we decline to rule upon because it was not presented to the Commission, and the other we reject on the merits.

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[20]Petitioner contends that it made out, and that the Commission's own findings indicate, 346 I.C.C. at 829, 830, a prima facie showing of a §3(4) violation. Petitioner argues in its brief:

> "[C]ost studies accepted by the Commission showed that Erie's yield under the reduced rate on the all rail route was 18 percent of fully distributed rail costs in rail-owned cars and 14 percent in shipper-owned cars whereas Erie's yield in the rail leg of the water route was approximately four to six times higher — 73 percent of fully distributed rail costs in rail-owned cars and 90 percent for shipper-owned cars. The evidence also shows that Erie would receive 40 cents to transport one hundred pounds of wheat 340 miles from Buffalo to Martins Creek but that it would receive only 47 cents per hundred pounds during the open navigation season and 57 cents per hundred pounds during the closed navigation season to transport wheat 910 miles from Chicago to Martins Creek."

Appendix A
(Decision of the United States Court of Appeals)

(A) *Prejudice to Water Carriers*

[13] This branch of petitioner's §3(1) argument (upon which we decline to rule) is based on the same facts which it urged in support of its claim of discrimination against the lake carriers under §3(4). See note 20, *supra.* Here New York argues, on behalf of the lake carriers, that Erie's failure to provide a unit train rate from Buffalo to Martins Creek is prejudicial to the lake carriers in violation of §3(1). Primary reliance is placed on *Lake Carriers' Association v. United States,* 399 F.Supp. 386 (N.D. Ohio 1975) (three-judge court).

This branch of petitioner's argument was not presented to the Commission for consideration in connection with its initial order or its order on any of the petitions for reconsideration. It appears to have been raised before us as an afterthought. In contrast to what we have said above regarding the §3(4) claim and in contrast to what was said in the *Lake Carriers'* case, 399 F.Supp. at 395-96, we decline to rule upon that issue here. The Supreme Court has admonished that "[a] reviewing court usurps the agency's functions when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission v. Aragan,* 329 U.S. 143, 155 (1946). We find no exceptional circumstances which would impel us to consider the issue here despite the failure to present it to the Commission.

(B) *Prejudice to Buffalo Shippers*

[14] As the other branch of its §3(1) argument, New York argues, as did the Buffalo flour milling interests in the proceedings before the Commission, that they are unduly prejudiced while ConAgra is unduly preferred by Erie's failure

to publish a unit train rate from Twin Ports and Twin Cities to Buffalo that is competitive with the open season lake rates. The rate Erie makes available to ConAgra during the open season is water-competitive. Petitioner argues that the Buffalo shippers are prejudiced because the open season unit train rate available to them is higher than, and therefore not competitive with, the lake vessel rate (43¢ as opposed to 26.67¢). Petitioner contends that equal treatment requires that open season water-competitive rates be available to Buffalo as well as to Martins Creek.[21]

The requisite elements of a §3(1) violation have been stated succinctly as follows:

> "[I]t must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor." *Chicago & Eastern Ill. R.R. v. United States,* 384 F.Supp. 298, 300-01 (N.D.Ill.1974) (three-judge court) (per curiam), *aff'd mem.*, 421 U.S. 956 (1975).

See *Louis Dreyfus Corp. v. United States,* 401 F.Supp. 919, 926-27 & n.4 (S.D.N.Y. 1975) (three-judge court).

On the facts of this case we find petitioner's claim to be particularly weak. The 72.25¢ open season unit train rate to

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[21] During the closed season the unit train rate to Martins Creek is set at a level to compete with the unit train rate to Buffalo (43¢); so petitioner does not challenge the closed season rate.

Martins Creek is about 68% higher than the 43¢ unit train rate which is available to Buffalo shippers. The rail distances from the origins to Martins Creek exceed the rail distances to Buffalo by slightly over 200 miles or about 20%. The unit train rate to Buffalo therefore is less expensive per mile than the unit train rate to Martins Creek. Furthermore, Buffalo has available to it the original water rate with which the all rail rate from Twin Ports and Twin Cities to Martins Creek is intended to compete. Petitioner nevertheless contends that the availability of a water-competitive all rail rate to Martins Creek gives ConAgra an undue advantage over the Buffalo mills because Martins Creek will have two alternative means of transportation from which to choose.[22] The Commission rejected petitioner's claims as speculative. We agree.

We hold that petitioner has not shown a disparity in rates; nor has it shown that it will be injured by the unavailability of an open season water-competitive unit train rate to Buffalo.

To summarize:

We grant the petition to review; we affirm the Commission's order that the proposed rates do not violate §3(1) of the Act; but, with respect to the §3(4) claim, we set aside the order and remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

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[22]Petitioner emphasizes the importance of having an alternative when shipping on the Great Lakes is interrupted, the closed season is unusually long, or a shipper is unable to obtain needed vessels. Petitioner also argues that ConAgra will have the advantage of being able to shop for the lower transportation cost because any adjustments in rail rates to reflect changes in lake rates necessarily will not be implemented as quickly as increases in lake rates, especially because they require notice and are subject to Commission review.

APPENDIX B

(Report and Order of Interstate Commerce Commission)

Decided January 18, 1978.
Served January 30, 1978.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

Investigation and Suspension Docket No. 8899

UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

Decided January 18, 1978

Upon further hearing, assailed unit-train rates on wheat from Minneapolis, Minnesota Transfer, St. Paul and Duluth, Minn., and Superior, Wis., to Martins Creek, Pa., found to be just and reasonable and not otherwise unlawful nor to discriminate unjustly against lake carriers at Chicago, Ill., provided equal rate treatment is accorded to them upon request. Findings in prior report, 351 I.C.C. 470, modified in part. Proceeding held open 90 days to afford lake carriers an opportunity to seek equal rate treatment.

Appearances as shown in prior reports, and, in addition: *John A. Daily* for respondent ConRail.

Appendix B
(Report and Order of Interstate Commerce Commission)

Robert P. Kane for the Commonwealth of Pennsylvania, intervener in support of respondents.

Robert J. Ables and *Walter C. Wallace* for S&E Shipping Corporation, intervener in support of protestants.

Leo C. Franey for the State of New York, intervener in support of protestants.

Howard Schulman for Seafarers International Union of North America, AFL-CIO, intervener in support of protestants.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

In the prior report on reconsideration, 351 I.C.C. 470, Appellate Division 2 found proposed unit-train rates on wheat from Minneapolis, Minnesota Transfer, and St. Paul, Minn. (Twin Cities), Duluth, Minn., and Superior, Wis. (Twin Ports), to Martins Creek, Pa., applying at different levels during the seasons of open and closed navigation on the Great Lakes, to be just and reasonable and not otherwise unlawful. This represented a reversal, in part, of division 2's findings in the initial report, 346 I.C.C. 814, which held that the open season unit-train rate from the Twin Cities to Martins Creek was unduly preferential to inland points and unduly prejudicial to Twin Ports in violation of section 3(1) of the Interstate Commerce Act. On appeal of the report on reconsideration, the United States Court of Appeals for the Second Circuit affirmed in part and set aside in part the Commission's orders entered in the above decisions. *State of New York* v. *United States,* No. 76-4085 (2d Cir., filed March 2, 1977). The court held that the

[1]Rates, costs, and differences therein are stated in cents per 100 pounds unless otherwise indicated.

Commission's decision finding the proposed rates not to be unduly prejudicial of Buffalo, N.Y., milling interests under section 3(1) of the act was proper, but that Appellate Division 2 erred in finding that the rates were not in violation of section 3(4) of the act. The proceeding was remanded for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines. In compliance with the court order and in recognition of changed circumstances, including the creation of Consolidated Rail Corporation (ConRail) and the desirability of obtaining current data, the Commission by order entered June 9, 1977, reopened the proceeding for further administrative handling including the filing of supplementary statements by the parties in connection with the section 3(4) issues raised on remand. Supplementary statements were filed (1) by the Soo Line Railroad Company (Soo), (2) by ConRail as successor in interest to the Erie Lackawanna Railway Company (Erie), (3) by ConAgra, intervener in support of respondents, and (4) separately by the State of New York and S&E Shipping Corporation (S&E) on behalf of the protesting lake carriers. Replies to each others statements were filed by the opposing parties, including another reply by the Commonwealth of Pennsylvania. In addition, Seafarers International Union of North America, AFL-CIO, (Seafarers) was permitted to intervene and to adopt supplementary statement filed by S&E by order served September 23, 1977.

We find the statement of the case as set forth in the prior reports to be accurate in all material respects except to the extent hereinafter indicated, and as supplemented here to reflect the additional statements and replies filed by the parties on remand, affirm, and adopt it as our own. Only those facts necessary for a clear understanding of the issues raised on remand will be restated.

Appendix B
(Report and Order of Interstate Commerce Commission)

The unit-train rates in question are published on two levels reflecting a lower basis in the summer than winter for application from Twin Cities or Twin Ports to Martins Creek. The rates were originally published by the Soo Line Railroad and the Erie (now ConRail) in 1973, at the request of ConAgra, a flour milling concern located at Martins Creek. The lower summer rate applies when the Great Lakes are open to navigation by lake carriers and was set at a level designed to meet the transportation and storage charges via a water-rail route to Martins Creek through the port of Buffalo, N.Y. The higher winter rate which applies during the closed navigation season was designed to compete with the combination rates on an all-rail route to Martins Creek via Buffalo. The alternative transportation costs used in justification of the proposed open season and closed season unit-train rates, as reflected in division 2's initial decision,[2] are set forth below:

I. Proposed open season rate of 72.25 cents:

(a) 26.67 cents — transportation by nonregulated water carriers from Twin Ports to Buffalo.

(b) 5.00 cents per hundredweight — cost of elevating grain at Buffalo.

(c) 40.00 cents — five-car rail rate published by Erie on wheat from Buffalo to Martins Creek.

(d) 71.67 cents — total.

II. Proposed closed season rate of 88 cents:

(a) 43 cents — Buffalo unit-train rate from Twin Ports and Twin Cities.

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[2]Division 2's initial decision was prepared on the basis of the 72.25-cent summer rate although it recognized that as of June 1, 1974, the rate had increased to 78.25 cents.

(b) 5 cents per hundredweight — elevation charge at Buffalo.

(c) 40 cents — Erie's five-car rate from Buffalo to Martins Creek.

(d) 88 cents — total.

The protesting lake carriers took the position that their inability to compete with the involved summer rate is not due to the inherent efficiency of the all-rail route, but rather to Erie's discriminatory failure to provide comparable unit-train rates and service, distance considered, from Buffalo to Martins Creek, New York City, and Philadelphia. According to them, Erie is exercising its monopoly control of the milling area east of Buffalo to force grain traffic off the Great Lakes by keeping ex-lake rates out of Buffalo at such a high level as to be non-competitive with the involved all-rail rates. At page 852 of the initial report (346 I.C.C. 814), division 2 stated:

> Section 3(4) provides in effect that rail carriers shall not discriminate in their rates between any connecting line or unduly prejudice any connecting line in the distribution of traffic that is not routed by the shipper. Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4). Aside from this, however, it is clear that there is no merit in protestant's argument. Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers.

Appendix B
(Report and Order of Interstate Commerce Commission)

As previously indicated, the court affirmed our finding under section 3(1) of the act but remanded the proceeding for further consideration of the section 3(4) issue.

The Soo emphasizes the importance of the involved grain traffic to its overall operations. In 1976, a poor grain year, it received almost $31.8 million in revenue for handling over 2.9 million tons of grain. Approximately 60 percent of this grain originated at country origins in western Minnesota, and the Dakotas, and Montana and moved to the Twin Cities or Twin Ports. Since the unit-train rates to Martins Creek became effective on June 1, 1974, the Soo has participated in the movement of approximately 1,700 cars moving under those rates to Martins Creek. It is also pointed out that during the last 4 years, the Great Lake carriers have enjoyed a very substantial increase in total domestic shipments of wheat from the Twin Ports to Buffalo and all other Great Lakes destinations.

Table I below, as reproduced from Soo's supplementary statement, shows that domestic wheat to Buffalo increased by over 16.5 million tons, or approximately 50 percent.

TABLE I

Lake shipments of domestic wheat from Duluth-Superior for years shown (in bushels)

Year	Buffalo tonnage	Total tonnage
1973	33,485,000	33,856,000
1974	41,783,000	43,056,000
1975	45,839,000	48,839,000
1976	50,004,000	50,004,000

Source: Duluth Board of Trade Annual Reports.

Tables II, III, and IV[3] below, also reproduced from Soo's supplementary statement, reflect an updated version of data

[3]Tables II-IV assume a movement of 5,100 tons in a 50-car train.

presented by respondents in previous verified statements comparing the revenues realized from the Buffalo and Martins Creek unit-train rates as proposed in January 1974, for the total movement (table II) and for each participating carrier (tables III and IV).

TABLE II

Respondents total revenue

	Per hundred-weight	Per car	Per train
	Cents		
Duluth, Minn., to Buffalo, N.Y.[1]	71.00	$1,448.40	$72,420.00
Duluth, Minn., to Martins Creek, Pa.[2]			
(Summer) April 1, 1977 to December 16, 1977	94.50	1,927.80	96,390.00
(Winter) December 16, 1976 to March 31, 1977	123.00	2,509.20	125,460.00

[1]Item 130-C, Soo Line F. T. 526-K, I.C.C. 7923.
[2]Item 140, Soo Line F. T. 543-E, I.C.C. 7959.

TABLE III

Soo line revenue

Duluth, Minn. to Buffalo, N.Y.[1]	31.95	651.78	32,589.00
Duluth to Martins Creek, Pa.[2]			
(Summer) April 1, 1977 to September 16, 1977	33.075	674.73	33,736.50
(Winter) December 16, 1976 to March 31, 1977	43.05	878.22	43,911.00

[1]Based on Soo Line division of 45 percent of thru rate.
[2]Based on Soo Line division of 35 percent of thru rate.

TABLE IV

ConRail revenue

Duluth, Minn. to Buffalo, N.Y.[1]	39.05	796.62	39,831.00
Duluth to Martins Creek, Pa.[2]			
(Summer) April 1, 1977 to September 16, 1977	61.425	1,253.07	62,653.50
(Winter) December 16, 1976 to March 31, 1977	79.95	1,630.98	81,549.00

[1]Based on ConRail division of 55 percent of thru rate.
[2]Based on ConRail division of 65 percent of thru rate.

Appendix B
(Report and Order of Interstate Commerce Commission)

Since April 1976, the unit-train movements of wheat to Martins Creek averaged 55.36 cars and approximately 5,430 tons. At today's summer unit-train level this would generate total revenues of $102,600 per train. According to Soo, ConRail's division would approximate $66,700 per train, approximately $4,000 more than is shown in table IV above. ConRail's division of the summer unit-train rate has increased 14.46 cents since original publication (30.8 percent) whereas the five-car rate from Buffalo to Martins Creek has increased only 7 cents during the same period (17.5 percent). A chronological comparison of the alternative water-rail rates or charges from Duluth to Martins Creek with the unit-train rates in issue, as set forth in appendix I to Soo's supplementary statement, indicates that the respondents have consistently adjusted the unit-train rates to Martins Creek to reflect any changes in ConAgra's alternative transportation costs from Twin Ports via the water-rail routes.

Inasmuch as the record shows that virtually all wheat moves to Buffalo exclusively in ships owned by water carriers holding no Commission authority, the Soo argues that such non-certificated water carriers are not "connecting lines" under section 3(4) of the act. Soo further contends that a finding that the railroads have no right to compete with the water carriers in this area because of prohibitions under section 3(4) would itself constitute an extremely destructive competitive practice and thereby confer an absolute monopoly position upon the exempt water carriers.

In its supplementary statement, ConRail rejects out of hand any suggestion that it discriminates against ex-lake traffic. The five-car rate from Buffalo applies on all traffic regardless of inbound mode, and ConRail avers that it has had no requests from lake carriers to make its Chicago division of the unit-train rates in issue available to them from Chicago to Martins Creek

in connection with ex-lake grain movements. According to ConRail, its division of the summer and winter rates to Martins Creek is currently 65 percent of the revenues, amounting to 61.5 cents and 80 cents per hundredweight, respectively. These divisions are 6.13 percent and 7.97 percent, respectively, of the first-class rate ($10.03 per hundredweight) from Chicago to Martins Creek. This compares with 7.26 percent which the five-car rate from Buffalo to Martins Creek (47 cents) bears to the corresponding first-class rate from Buffalo ($6.47 per hundredweight). ConRail emphasizes that the composite winter-summer relationship (7.05 percent) is very close to the Buffalo rate basis (7.26 percent). ConRail states that it "is ready, willing and able to consider any proposal for the movement of traffic in question when received ex-water via Chicago on the same basis it presently extends to its rail connection," provided "that any services required in addition to those performed by ConRail in all-rail interchange must be at the water carrier's expense." ConRail states its ultimate position as follows:

> • • • If • • • the Commission finds discrimination in Buffalo rate vis-a-vis the Chicago 'summer' division, it will be ConRail's purpose to seek first an adjustment in the all-rail joint rate or an inter-carrier adjustment in divisions to remove any legal impediment. Failing that, ConRail will terminate its participation in the all-rail summer rate. This course is considered preferable to any adjustment in the present Buffalo basis, which could result in loss of revenue and additional controversy.

In short, ConRail intends to retain the Buffalo situation intact.

ConAgra emphasizes in its supplementary statement that it is just as important to ConAgra to have lake carriers available as an alternative to rail transportation as it is to have the railroads available as an alternative to lake transportation. Since the unit

train rates to Martins Creek became effective, ConAgra has allocated its wheat traffic to both modes on nearly an equal basis. For example, total unit-train receipts of wheat from January 1975 through May 1977 have been approximately 4.3 million bushels while lake/rail and lake/truck receipts have been 4.5 million bushels. ConAgra sincerely believes that the present situation is one of healthy competitive balance which does not discriminate against any water carrier engaged in lake carriage of grain. It is pointed out that the only lake carrier appealing the Commission's decision (S&E) holds no authority under part III of the act and that the Lake Carriers Association in a petition filed with the Commission indicated its opinion that a unit-train rate no lower than 88 cents (the current level then was 89 cents) would satisfy the interests of its grain hauling members. ConAgra notes that perhaps the best evidence of the lack of any unjust discrimination is the absence of any of the alleged victims of such discrimination from this case. ConAgra states that it has never been approached by any lake carrier indicating any interest in participating in a through movement from Duluth Superior via lake to Buffalo and thence via unit train to Martins Creek. According to ConAgra there are no facilities at Buffalo capable of accommodating three consecutive 50-car trainloads of grain as would be required in unit-train service, and that the only elevator and storage facilities which are available to ConAgra at Buffalo are controlled by its competitors in the selling of flour. Notwithstanding the foregoing, ConAgra asserts that it cannot afford to be completely dependent upon lake service because (1) the availability of lake service is seasonal while ConAgra's milling requirements are year round, (2) there is no assurance of rate stability for planning purposes in view of the exempt status of lake carrier operations, and (3) the routing of grain via Buffalo by rail is inherently inefficient due to congestion at that port entailing as long as 24-day rail transit

time to Martins Creek or three or four times as long as total rail transit time from Twin Ports to Martins Creek under the unit-train rates.

In its supplementary statement, S&E takes the position that the factual situation here clearly presents a section 3(4) violation under past court and Commission cases.[4] Also relied on by S&E is the following quote from New York State's brief before the Court of Appeals[5] for the proposition that a prima facie showing of a section 3(4) violation has been made:

> Cost studies accepted by the Commission showed that Erie's yield under the reduced rate on the rail route was 18 percent of fully distributed rail costs in rail-owned cars and 14 percent in shipper-owned cars whereas Erie's yield in the rail leg of the water route was approximately four to six times higher — 73 percent of fully distributed rail costs in rail-owned cars and 90 percent of shipper-owned cars. The evidence also shows that Erie would receive 40 cents to transport one hundred pounds of wheat 340 miles from Buffalo to Martins Creek but that it would receive only 47 cents per hundred pounds during the open navigation season and 57 cents per hundred pounds during the closed navigation season to transport wheat 910 miles from Chicago to Martins Creek.

It is argued that the above rate disparity constitutes a prima facie case of discrimination under section 3(4) which shifts the burden to the railroad to justify this disparity, citing *Western*

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[4] *ICC* v. *Mechling*, 330 U.S. 567, 576, (1947); *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671, 697 (1943); *Valley Line Co.* v. *United States*, 390 F.Supp. 435, 438-39 (W.D. Pa. 1975); *Seatrain Lines, Inc.* v. *United States*, 233 F.Supp. 199, 210 (D.N.J. 1964); *Atchison, Topeka and Santa Fe Ry.* v. *United States*, 194 F.Supp. 438 (D. Kan. 1961); *Arrow Transportation Co.* v. *United States*, 176 F.Supp. 411, 419 (N.D. Ala. 1959), affirmed sub nom.; *State Corporation Commission* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960) (per curiam).

[5] The same quote appeared in Soo's supplementary statement where it was pointed out that the relative numbers relied upon by the State of New York have been substantially changed.

Pacific Railroad Company v. *United States*, 263 F.Supp. 140 (1966), in support. S&E urges that the unlawfulness be removed either by requiring respondents to cancel the offending rates in issue or by mandating the establishment of proportional or joint rates under the provisions of section 307(d) of the act as was required by the court in *Lake Carriers Association* v. *United States*, 399 F.Supp. 386 (1975), and implemented, on remand, by the Commission, Division 2, in its decision and order in No. 34822, *Lake Carriers' Association, et al.*, v. *The New York Central Railroad Company, et al.*, served February 28, 1977, I.C.C. . Therein division 2 prescribed proportional unit-train rates to certain Lake Erie ports on steam coal which bear the same revenue-variable cost relationship as the all-rail unit-train rates from certain origin mines in Ohio to electric utility destinations at Detroit, Trenton or Essexville, Mich.

The State of New York's position on remand is basically the same as discussed above in connection with S&E's presentation. New York emphasizes that the existing cost data of record clearly show that the disparity in rates is unjustified and requests that the issue rates be found unlawful and that an appropriate order canceling the rates be entered. Intervener Seafarers urges that such rates should be ordered canceled in order to eliminate the inequality of treatment by which the lake carriers and their employees have been victimized since the effectiveness of the assailed unit-train rates to Martins Creek.

In their reply statements, the rail respondents and ConAgra reiterate their general position that there can be no violation of section 3(4) where, as here, no part III connecting carrier or potential shipper has any problem with the existing rate structure. They also rely on *Routing Coal from Origins on Louisville & N.R.*, 313 I.C.C. 752, 758 (1961), for the proposition that an essential prerequisite to a violation of section 3(4) of the

act respecting discrimination against connecting lines is a similarity of transportation circumstances and conditions. It is pointed out that the record as reflected in the initial report herein clearly establishes the lack of similarity as between the conditions attending the unit-train movements to Martins Creek and those attending the five-car movements of grain from Buffalo to the same destination. Due to operational handicaps, they do not believe that the establishment of unit-train service from Buffalo to Martins Creek would be practical or economical. Issue is also taken with the position of S&E and New York that the Commission's decision in No. 34822, *Lake Carriers* case, *supra,* is dispositive of this proceeding. That case was finally decided on the basis of a section 3(1) violation, and the Court of Appeals herein specifically declined to rule upon that issue when raised by New York in support of a similar position taken on appeal.

In its reply statement, the Commonwealth of Pennsylvania supports the respondents' position on the section 3(4) issue. On the other hand, reply statements by New York and S&E urge that the new information of changed circumstances recited by respondents and ConAgra is of no consequence and that similar issues raised in prior section 3(4) cases have been rejected by the Commission and the courts. These protestants adhere to their original position that the respondents have failed to rebut the prima facie showing of discrimination under section 3(4) of the act.

DISCUSSION AND CONCLUSIONS

As previously indicated, this case on appeal was remanded by the court "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines." In the prior reports, the division never determined whether the unit-train rates to Martins Creek

discriminate against the lake carriers. Instead, section 3(4) of the act was held to be inapplicable to the lake carriers because (1) there was no evidence that they were subject to part III of the act and (2) they were not "connecting lines" because the unit-train route to Martins Creek did not pass through Buffalo. Both of these findings were rejected by the court, which held that section 3(4) was applicable to the protesting lake carriers *State of New York* v. *United States,* No. 76-4085, slip opinion at 2125 through 2132 (2nd Cir. March 2, 1977). The court concluded that the Commission was fully aware that some water carriers on the Great Lakes are subject to part III of the act. It interpreted the division's treatment of this issue as meaning that part III carriers, exempted from regulation when transporting commodities in bulk, lose the protection afforded them under section 3(4). This was not our intent in the prior decision. Appellate Division 2 findings in this regard were meant to apply only to noncertificated lake carriers which are not subject to part III. Inasmuch as the grain traffic could be handled by certificated lake carriers subject to regulation under part III and at least one such carrier is a member of protestant Lake Carriers' Association as indicated in note 13 at page 2127 of the court's decision, *supra,* we agree with the court's holding and cases cited in support at page 2128, *supra,* that part III water carriers are entitled to the protection of section 3(4) although their carriage of wheat in bulk exempts them from regulation under section 303(b) of the act. On the other hand, the court's finding that the lake carriers are connecting lines within the meaning of section 3(4) is directly contrary to the division's finding at page 852 of the initial report, *supra.* The court rejected respondents' argument on appeal that a point of interchange between the water and rail carriers "need not be the same as the point of interchange with a connecting rail line, but the respective rail and water interchanges at least must be located on the same

route." See page 2130 and note 19 of the court's decision, *supra.* Instead, the court accepted petitioner State of New York's position that since the Erie (now ConRail) serves Buffalo and also participates in the involved all-rail movements of wheat to Martins Creek, the lake carriers are connecting lines within the purview of the court decision in *Seatrain Lines, Inc.* v. *United States,* 223 F. Supp. 199, and the Commission's own decision in *Ingot Molds, Ohio & Pa. to Cypress, Tex.,* 349 I.C.C 102. We are bound by the court's holding with respect to the "connecting lines" issue. Accordingly, no further consideration will be given to the arguments of respondents and supporting parties which, in effect, challenge the court's holding on this point.

In support of their allegation the unit-train rates to Martins Creek unjustly discriminate against connecting lake carriers at Buffalo, the protestants have shown a difference in ConRail's divisions of revenue as between the Chicago and Buffalo movements to Martins Creek, which revenue disparity cannot be justified on the basis of relative costs alone. In view of this, it becomes incumbent upon the respondents to justify the difference in rate treatment as between connecting lines by a showing of substantial differences in operating conditions and circumstances attending the two movements. See *Western Pacific R. Co.* v. *United States, supra,* at page 246, where the Supreme Court stated:

> * * *, the remedy in §3(4) situations need not entail the establishment of through routes, joint rates, or indeed any particular form of relief. All that is required is the elimination of discriminatory treatment. * * * Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the alleged discriminating carrier. * * *

Appendix B
(Report and Order of Interstate Commerce Commission)

In our view the evidence is convincing that the establishment of a new unit-train service over Buffalo would be inefficient, uneconomical, and counter productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines.

ConRail has taken a firm position that the Buffalo to Martins Creek route would be totally unreasonable for unit-train service and that it will cancel its participation in that portion of the involved unit-train route from Chicago to Martins Creek rather than institute a new unit-train service from Buffalo to Martins Creek. In recognition of the unfavorable operating conditions attending the Buffalo-Martins Creek route, division 2 stated at page 823 of the initial report:

> Erie presently moves wheat on behalf of ConAgra from Buffalo to Martins Creek at the five-car rate of 40 cents. The shipments originate at elevators served direct or those served by the Buffalo Creek Railroad. All cars handled at Buffalo except those in unit trains move through Bison Yard, operated jointly by Erie and Norfolk & Western. Respondent's Buffalo terminal is said to be congested. Seventeen inbound and 11 outbound Erie trains and 6 inbound and 6 outbound Norfolk & Western trains comprising 3,435 cars move through the terminal each day. In addition, 430 cars are delivered daily to connections and about the same number are received from connections. Forty-one interchange and industry engines work out of the yard and there are extensive piggyback and automobile loading operations.
>
> Though Bison Yard has been modernized by installation of an electronic humping section, the congestion and weather frequently conspire to bring about delays in the handling of freight cars. * * *

Traffic studies conducted by ConAgra strongly support division 2's conclusions regarding traffic congestion and other operational deficiencies at the Buffalo railroad terminal.[6] These studies reflect that total elapsed time between arrival of cars at Buffalo for loading and the arrival thereof at Martins Creek for unloading took as long as 24 days or three to four times as long as total transit time incurred on unit-train shipments from Twin Ports to Martins Creek under the rate here in issue. Moreover, ConAgra lacks the necessary elevator and storage facilities at Buffalo deemed necessary for normal utilization of unit-train service from that port. It wants and needs at least the choice to avoid the chaotic terminal situation at Buffalo by obtaining grain over other routes at competitively priced rate levels. The proposed unit-train rates from the Twin Ports and Twin Cities afford ConAgra a constant flow of grain inventory necessary for efficient flour milling at a price competitive with Buffalo millers, which result could not be attained through the availability of unit-train service from Buffalo to Martins Creek. We conclude that the institution of a comparable unit-train service from Buffalo to Martins Creek would be inefficient and uneconomical and that the disparity in rate treatment as between Chicago and Buffalo does not constitute unjust discrimination prohibited under section 3(4) of the act.

What has been said above with respect to Buffalo does not apply to the route via Chicago to Martins Creek. Inasmuch as the operating conditions attending the ex-rail movements of grain from Chicago to Martins Creek would be substantially similar to those attending ex-lake rail movements from Chicago to Martins Creek, a refusal by ConRail to participate in joint rates and through routes with connecting lake carriers on ex-lake wheat

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[6]See also No. 35786, Feed Grains to New England, I.C.C. (served February 10, 1977), at pages 4-5.

shipments from Chicago to Martins Creek on the same basis as accorded Soo in connection with the all-rail route would unjustly discriminate against connecting part III water carriers in violation of section 3(4) of the act. ConRail states that it has received no requests from any lake carrier seeking like rate treatment on ex-lake wheat shipments from Chicago to Martins Creek, and this averment has not been disputed by the protestants. Since it appears that ConRail now stands ready and willing, upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago, there appears to be no violation of section 3(4) of the act. However, we will hold the record open in order to give any part III water carriers an opportunity to join with ConRail in the establishment of joint rates and through routes via Chicago on ex-lake shipments of wheat from Chicago to Martins Creek. In the event ConRail refuses to participate in such an arrangement on an equal basis as is now accorded Soo over the all-rail route, the lake carriers will have recourse to the Commission for appropriate relief. In this respect, where equal rate treatment can be afforded both modes at a common point of interchange (Chicago), the case at hand involving alleged discrimination against connecting lines at Buffalo, is readily distinguishable from *Western Pacific, supra, Seatrain Lines, supra,* and *Ingot Molds, supra,* relied on by the protestants, where the Commission and the courts have granted section 3(4) relief to "connecting lines" in the absence of a common point of interchange.

On further hearing, we find the proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek to be just and reasonable, and not otherwise unlawful provided ConRail, upon request, extends equal rate treatment to part III water carriers on ex-lake shipments of wheat from Chicago to Martins Creek.

Appendix B
(Report and Order of Interstate Commerce Commission)

We further find that this decision is not a major Federal action affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That this proceeding be held open for 90 days from the date of service thereof in order to afford part III water carriers an opportunity to enter into joint-rate and through-route arrangements with ConRail on ex-lake wheat shipments from Chicago to Martins Creek.

By the Commission.

(SEAL)

H. G. HOMME, Jr.
Acting Secretary

356 I.C.C.

APPENDIX C

(Decision and Order of the United States Court of Appeals)

Entered in the Office of the Clerk of the United States Court of Appeals for the Second Circuit on May 7, 1979 (600 F2d 349).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32 – August Term, 1978.

(Argued September 17, 1978 Decided May 7, 1979.)

Docket No. 78-4036

STATE OF NEW YORK,

Petitioner,

—and—

S & E SHIPPING CORP. and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Intervenors,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents,

—and—

PENNSYLVANIA PUBLIC UTILITIES COMMISSION, CONSOLIDATED RAIL CORPORATION, SOO LINE RAILROAD COMPANY and CONAGRA, INCORPORATED,

Intervenors.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appendix C
(Decision and Order of the United States Court of Appeals)

Petition for review of Interstate Commerce Commission order upholding proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek. Petition denied.

PATRICK MCELIGOT, Washington, D.C. (Bryce Rea, Jr. and Leo C. Franey, Washington, D.C., of Counsel), *for Petitioner.*

ROBERT J. ABLES, Washington, D.C. (Walter C. Wallace, Washington, D.C. of Counsel), *for Intervening Petitioner, S & E Shipping Corp.*

DAVID JAFFEE, New York, N.Y. (Schulman, Abarbanel & Schlesinger, New York, N.Y., Howard Schulman, of Counsel), *for Intervening Petitioner, Seafarers International Union of North America, AFL-CIO.*

L. MARIE GUILLORY, Washington, D.C., Attorney, Interstate Commerce Commission (John H. Shenefield, John J. Powers, III, Robert Wiggers, Mark L. Evans and Henri F. Rush, Interstate Commerce Commission, of Counsel), *for Respondents, Interstate Commerce Commission and United States of America.*

C. HAROLD PETERSON, Minneapolis, Mn., *for Intervening Respondent, Soo Line Railroad Company.*

PETER A. GREENE, Washington, D.C. (Caldwell & Greene, Washington, D.C., of Counsel), *for Intervening Respondent, ConAgra, Incorporated.*

JOHN A. DAILY, Philadelphia, Pa. (Robert M. Peet, New York, N.Y., of Counsel), *for Intervening Respondent, Consolidated Rail Corporation.*

KATHLEEN H. LARKIN, Harrisburg, Pa., Chief Counsel, Pennsylvania Public Utility Commission (Alfred N. Lowenstein, of

Counsel), *for Intervening Respondent, Pennsylvania Public Utility Commission.*

VAN GRAAFEILAND, *Circuit Judge*:

The State of New York seeks review of a 1978 order of the Interstate Commerce Commission[1] discontinuing its investigation of certain train rates alleged to discriminate against Great Lakes grain carriers in violation of 49 U.S.C. §3(4).[2] In 1977, we reversed a prior Commission order which had held that the allegedly injured lake carriers were not protected by section 3(4) and remanded for the Commission to determine whether discrimination did in fact exist. *State of New York v. United States*, 568 F.2d 887 (2d Cir. 1977). The Commission has now found that the proposed rates are not discriminatory, and the matter is once again before us for review. The facts were discussed in our prior opinion and will be referred to herein only so far as is necessary to frame the issues.

The City of Buffalo is the flour milling center of the eastern United States. Grain is hauled into Buffalo from the midwest by rail, truck, and ship, stored there in elevators, and then distributed throughout the eastern states. Since 1964, much of the rail traffic into Buffalo has been by unit-train movements originating on the Soo, Burlington Northern, or Chicago & Northwestern and connecting at Chicago with either the Erie, Norfolk & Western, or Penn Central.

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[1] *Unit Train Rates on Wheat, Minn. & Wis. to Martins Creek, Pa.*, 356 I.C.C. 82 (1978).

[2] So far as pertinent, §3(4) prohibits carriers from discriminating in their rates, fares, and charges between connecting lines.

Appendix C
(Decision and Order of the United States Court of Appeals)

A unit-train consists of fifty or more cars, made up, transported, and delivered as a unit. Intertrain and intratrain switching are eliminated. The cars move under a single "gang" waybill. They are returned as a single intact group to the original point of shipment. Clerical work for routing and billing is minimal. Unit-train service permits better utilization of cars, and locomotive and crew needs can be planned with some predictability. It is an efficient and economical method of handling bulk shipments. However, it is not available for movements eastward from Buffalo to places such as Martins Creek, Pennsylvania.

For the first year after ConAgra opened its flour mill at Martins Creek in March 1973, it received its grain from Buffalo mills. That portion which had been delivered to Buffalo by rail had come over 1100 miles from Twin Ports or Twin Cities at a unit-train rate of 43 cents per 100 pounds. The 340-mile rail movement from Buffalo to Martins Creek was at a five-car rate of 40 cents per 100 pounds. Obviously, the latter rate was higher per mile than the former. The rate eastward from Buffalo was the same, however, regardless of whether the grain movement into Buffalo from the west was by ship, rail, or truck. Clearly, no carrier from the west could claim that it was being discriminated against because of the higher Buffalo to Martins Creek rate.

In September 1973, Soo and Erie published rates for unit-train movements from Twin Ports and Twin Cities, bypassing Buffalo and going directly to Martins Creek. The tariff, which became effective on June 1, 1974, called for open navigation season unit-train rates of 72.25 cents per 100 pounds and closed navigation season unit-train rates of 88 cents per 100 pounds. Petitioner contends that these rates, although more expensive per mile than the unit-train rates into Buffalo and more expensive overall

than the lake-rail rates to Martins Creek, discriminated against lake carriers transporting grain into Buffalo.[3] The Commission disagrees.

Congress has committed to the Commission "the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination." *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53 (1940). Our review of the Commission's determination is limited in nature; we may not set it aside if it was within the Commission's statutory power to make and is supported by substantial evidence. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-36 (1946); 5 U.S.C. §706. Evidence may be substantial without being weighted in favor of the Commission's holding. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). If it would justify a trial court in refusing to direct a verdict, it will withstand judicial scrutiny on review of the Commission's order. *Illinois Central Railroad Co. v. Norfolk & Western Railway Co.*, 385 U.S. 57, 66 (1966). We think the evidence in the instant case satisfies these requirements.

Chicago, where ConRail's haul originates, is a common point of interchange for both lake and rail traffic. It is a large grain

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[3]Petitioner bases its argument upon a comparison of the new rates with the Buffalo to Martins Creek rate. For Erie's 910-mile leg from Chicago to Martins Creek, the open navigation season rate under the new tariff provided revenue of .0516 cents per mile. The 340-mile haul from Buffalo to Martins Creek provided Erie with revenue of .1176 cents per mile. These rates have been increased since 1974, but the relationship between them remains substantially the same. The present open season rate of 94.5 cents gives ConRail (Erie's successor) .0675 cents per mile revenue on its haul from Chicago to Martins Creek; and an increased rate of 47 cents per 100 pounds from Buffalo to Martins Creek gives ConRail .1382 cents per mile revenue on that haul. ConRail's net revenue over both variable and fully allocated costs is higher on the Buffalo to Martins Creek run.

market with extensive storage facilities and elevators capable of loading unit-trains of fifty or more cars. ConRail may move unit-trains of grain from that connecting point directly to Martins Creek without going near the City of Buffalo. On the other hand, it may detour 200 miles into Buffalo, a second lake and rail connecting point, and go from there to Martins Creek. (See map in our prior opinion, 568 F.2d at 891).

On the first hearing before the Commission, the protestants challenged the proposed unit-train rates from Twin Ports and Twin Cities because similar unit-train rates were not made available to elevators in Chicago. Their contention that this unavailability violated sections 4(1) and 3(1) of the Act was rejected by the Commission. Following remand, however, the Commission held that operating conditions attending ex-rail and ex-lake movements of grain from Chicago to Martins Creek would be substantially similar and that it would be a violation of section 3(4) if ConRail refused to participate in joint rates and through routes with lake carriers at Chicago on the same basis as it did with the Soo Railroad. ConRail has indicated its willingness to do so. However, no request for such service has yet been made by any lake carrier.

In summary, then, the record shows ConRail moving grain between Chicago and Martins Creek, with two possible points of interchange with lake traffic, Chicago and Buffalo. At Chicago, ConRail is prepared to enter into equal rate arrangements with all connecting carriers. At Buffalo, all connecting carriers are already treated the same.

The Interstate Commerce Act's prohibition against discrimination requires that all should be treated the same under the same or similar circumstances. *Pittsburgh & W.V. Ry. Co. v. United States*, 41 F.2d 806, 810 (N.D. Ohio 1929), *aff'd*, 281

U.S. 479 (1930). Put another way, "[s]ection 3(4) requires equality of treatment between connecting lines but equality of treatment involves comparable conditions. . . ." *Atlantic Coast Line Railroad Co. v. United States,* 205 F. Supp. 360, 365 (M.D. Ga.), *aff'd,* 371 U.S. 6 (1962) (per curiam). With respect to lake traffic, the yardstick for measuring discrimination is "the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination." *Arrow Transportation Co. v. United States,* 176 F. Supp. 411, 419 (N.D. Ala. 1959), *aff'd,* 361 U.S. 353 (1960). The Commission was satisfied in this case that, where comparable conditions between lake and rail carriers existed, equal rate treatment was available and that, accordingly, there was no violation of section 3(4).[4]

The Commission found that it would be inefficient and uneconomical for ConRail to institute unit-train service between Buffalo and Martins Creek that would be comparable to its unit-train service from Chicago. The Chicago unit-train rate is applicable to shipments consisting of at least three consecutive unit-trains of at least fifty cars each. ConAgra is the only shipper capable of receiving grain in such quantities at Martins Creek, the destination to which the proposed tariff applies. The Commission found that a "chaotic" traffic situation existed at the Buffalo terminal causing inordinate traffic congestion and delay on shipments to Martins Creek.[5] This, plus the lack of elevator and storage facilities at Buffalo capable of ac-

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[4]The lake carriers say they have no desire to go to Chicago; that they prefer to go to Buffalo. By the same token, ConRail could argue that, insofar as Martins Creek's shipments are concerned, it preferred to go to Chicago rather than to Buffalo.

[5]The Commission found that the elapsed time between the arrival of cars at Buffalo for loading and the arrival at Martins Creek for unloading was as much as 24 days, or three to four times as long as for the haul from Twin Ports to Martins Creek.

commodating three consecutive fifty-car trainloads of grain, would prevent ConAgra from securing the constant flow of grain inventory necessary for efficient and competitive milling. The existence of such "operating deficiency", the Commission found, justifies a disparity in rates as between the connecting lines at Buffalo and those at Chicago.

ConAgra has not requested the installation of unit-train service between Buffalo and Martins Creek. Significantly, neither has petitioner nor any lake carrier. Petitioner simply requests this Court to order the cancellation of the unit-train rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable. However, there was substantial evidence to support the Commission's finding that unit-train service was more efficient and economical than movement in single of five-car lots[6] but that normal utilization of unit-train service was not available on the Buffalo to Martins Creek haul. This determination is properly entrusted to the enlightened judgment of the Commission. *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286 (1934). Our judicial function is exhausted if there is a rational basis in the evidence to support the Commission's conclusion. *Consolidated Carriers Corp. v. United States*, 321 F. Supp. 1098, 110 (S.D.N.Y. 1970), *aff'd*, 402 U.S. 901 (1971).

Upon remand, the Commission properly received additional evidence as to the effect of the disputed tariffs. *Rush v. Gardner*, 273 F. Supp. 753, 755 (N.D. Ga. 1967). This showed that, between

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[6]In addition to the customary economies incident to unit-train movements, the tariff requirement of three consecutive movements eliminates the cost of assembly and breakup of trains after each movement. Moreover, in this instance, the cars involved are furnished by the Soo, thus effecting a substantial additional saving for ConRail.

1973 and 1976, annual shipments of wheat to Buffalo by lake carrier increased by over 16.5 million tons, or approximately fifty percent. It disclosed also that, despite the adoption of the challenged unit-train rates, about fifty percent of ConAgra's wheat requirements are still transported by lake carrier and seventy percent of all grain movements from Buffalo to Martins Creek are by truck. This evidence gives little support to petitioner's claim of discrimination.

The petition for review is denied, and the Commission's order of January 18, 1978, is affirmed.

TIMBERS, *Circuit Judge*, dissenting:

More than two years ago, this Court remanded this case to the ICC "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines." *State of New York v. United States*, 568 F.2d 887, 897 (2 Cir. 1977).[1] Our remand was a narrow one which called for a specific determination on a precise issue. As the author of our earlier opinion remanding the case to the ICC, it is crystal clear to me that the Commission on remand either has misconstrued our mandate or has ignored it. 356 I.C.C. 82 (1978). I therefore dissent from today's majority opinion which denies the petition to review and affirms the Commission's order of January 18, 1978.

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[1]Our prior opinion was rendered by Judges Anderson and Timbers. The third member of the panel, Judge Hays, who heard the argument, was not able to participate further because of temporary illness.

Our order remanding the case to the ICC to determine whether the proposed rates discriminate against the lake carriers as connecting lines followed our holding (1) that the Commission had erred in its interpretation of §3(4) of the Interstate Commerce Act in finding that the lake carriers were not entitled to protection under §3(4), and (2) that the lake carriers were not "connecting lines" within the meaning of the statute. 568 F.2d at 894-97.

The crux of the Commission's error is that, rather than making a determination of the discrimination issue on the basis of *existing actual conditions* on the Buffalo-Martins Creek run (which was the clear import of our remand), it has come up with a decision based on a *hypothetical new unit-train service* (which is totally beyond the scope of our mandate). In short, the Commission has simply not made the determination required by our mandate.

It is undisputed on the record before us that a rate differential, unjustified by cost differences, has been shown. The Commission so found. 356 I.C.C. at 92. The precise issue therefore is whether the railroads can justify charging twice as much to transport wheat over a rail route that connects with a water carrier than over the competing rail route that connects with another railroad, despite the fact that the rail revenue yield on the water-rail route is substantially higher than the yield on the competing rail route.

Under these circumstances, the rule of *Western Pacific Railroad Co. v. United States*, 382 U.S. 237 (1965), becomes applicable, namely, that relief to eliminate discriminatory rate treatment which is prohibited by §3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4) (1976), is warranted if "that differential treatment is not justified by differences in operating conditions that substantially affect the allegedly discriminating carrier." *Id.* at 246. In short, the burden is on the railroads here to justify the differential on the basis of different operating conditions on the two routes referred to above, see *Seatrain Lines, Inc. v. United States*, 233 F.Supp. 199, 209 (D.N.J. 1964) (three-judge court), by showing that it would be unfair or unjust to require equal treatment by the allegedly discriminating carrier. *Western Pacific Railroad Company v. United States*, 263 F.Supp. 140, 145 (N.D. Cal. 1966) (three-judge court, on remand

from Supreme Court). See *I.C.C. v. Mechling*, 330 U.S. 567, 581 (1947).[2]

While the Commission on remand purported to give lipservice to the Supreme Court's holding in *Western Pacific Railroad Co., supra*, 356 I.C.C. at 92, its decision to permit the railroads to maintain a rail rate structure which discriminates against water carriers at Buffalo is grounded upon the following one-sentence finding:

> "In our view the evidence is convincing that the *establishment of a new unit-train service* over Buffalo would be inefficient, uneconomical, and counter-productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines." 356 I.C.C. at 92. (emphasis added).

Such a finding, based not on *existing actual conditions*, but on a *hypothetical new unit-train service*, most assuredly does not comply with out mandate. And I fail to see any support for it in the Supreme Court's test set forth in *Western Pacific Railroad Co., supra.*

The railroads, in my view, have totally failed to justify the undisputed rate discrimination which has been found, permitting ConRail to earn roughly twice as much, *after expenses*, from its Buffalo-Martins Creek route as from its Chicago-Martins Creek route. *See* Majority Opinion at 2521 n. 3.

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[2]Perhaps some clue to the error into which I think the majority has fallen in the instant case is its failure to consider the controlling Supreme Court cases of *Western Pacific Railroad Co., supra*, and *Mechling, supra;* nor does the majority refer in any way to the closely analogous three-judge court cases of *Seatrain Lines, supra*, and *Western Pacific Railroad Co., supra* (on remand).

In many respects the instant case is analogous to *Seatrain Lines, Inc. v. United States, supra.* There it was claimed that operating disadvantages on the water-linked rail route justified clearly discriminatory rates. The three-judge district court, after holding that the Commission's finding of no discrimination under §3(4) was in error, remanded the case to the ICC. The ICC here has failed even to make a finding pursuant to our remand, relying instead on a hypothetical proposed new unit-train service.

I can appreciate the desire of my colleagues to draw down the curtain on this prolonged litigation. It has involved three Commission decisions and two petitions to review in this Court. Our prior decision of two years ago reviewed and remanded the two prior Commission decisions. Nevertheless, I do not believe that we can let the Commission's latest decision stand without unleashing endless mischief from a precedent standpoint.

Since the Commission's findings demonstrate that the discriminatory rail rates are not justified and are unlawful under §3(4) of the Act, I believe that a further remand to the Commission would be an exercise in futility. I therefore would direct the Commission to enter an order (within a reasonable period of time to allow any aggrieved party to seek Supreme Court review) cancelling the rates under investigation in this docket which have created the unlawful discriminatory rate structure. This may seem strong medicine. But strong medicine is precisely what should be prescribed to remedy the flagrant

violation of §3(4) of the Interstate Commerce Act disclosed by the undisputed record before us.[3]

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[3]Despite my disagreement with the majority's essential holding which denies the petition to review and affirms the Commission's order of January 18, 1978, I do agree with the majority's holding in the following respects:

(1) It was proper for the ICC to make part of the record on remand the supplemental statements of the parties. *Rush v. Gardner*, 273 F.Supp. 753, 755 (N.D. Ga. 1967) (three-judge court). As a practical matter, agency efforts on remand to keep the factual record fresh should not be discouraged.

(2) There was no error in the ICC's determination to include a Chicago rate in its decision after remand. That rate, however, does not cure whatever discrimination may exist at Buffalo. The purpose of §3(4) was to prevent railroads from exercising discretion in serving connecting carriers. That is exactly what offering the equivalent rate to grain carried by lake shippers but at Chicago only would allow ConRail to do.

(3) That intervenor S&E Shipping falls within the protective umbrella of §3(4), even though we differ over how much protection the umbrella affords in the instant case.

APPENDIX D

(Order of the United States Court of Appeals)

Order of the United States Court of Appeals, Second Circuit, dated October 3, 1979.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of October, one thousand nine hundred and seventy-nine.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILLIAM H. TIMBERS
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges.

STATE OF NEW YORK,

Petitioner,

—against—

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

S & E SHIPPING CORP., SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (CONRAIL), CONAGRA INCORPORATED, PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Intervenors.

78-4036

Appendix D
(Order of the United States Court of Appeals)

Three petitions for rehearing and/or rehearing *en banc* have been submitted by the State of New York, the Seafarers International Union of North America, AFL-CIO, and S & E Shipping Corp., respectively.

Before deciding on a rehearing, it seems appropriate to request the parties, by further briefs, to clarify their interests, financial and otherwise, with respect to the rates in issue. We pose the following questions:

1. Who are the lake carriers, if any, in this proceeding and how are they being discriminated against?

2. Is the 40-cent rate from Buffalo to Martins Creek discriminatory and if so, how?

3. Are there other issues than the summer rates?

4. Is there any question that the all-rail rates from the grain sources to Martins Creek are not proper?

5. What effect, if any, does the trans-shipment of grain at Buffalo from lake to rail have on the over-all rates from source to Martins Creek?

6. What is ConAgra's position with respect to the respective lake-rail, all-rail transportation rates?

No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo. Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek.

It serves no beneficial purpose merely to say that the Commission did not comply with the Court's previous limited remand which SIU states was "to determine whether proposed

rates on the all rail route discriminated against lake carriers on the water-rail route". (SIU, Petition p. 2). To S & E Shipping Corp. the Commission was "to decide if there was discrimination, at Buffalo, not with the Chicago connection. . . ." (S & E Petition p. 3).

However, the Buffalo-Martins Creek rate is not *per se* determinative of discrimination but only as related to the total rates from grain source to Martins Creek via lake-rail or all-rail methods of transportation. We had assumed that this Court was being asked "to order the cancellation of the unit-train rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable".

THEREFORE, IT IS HEREBY ORDERED that before deciding the petitions for rehearing, the parties shall submit briefs in response to the above questions on or before October 19, 1979.

/s/ Leonard P. Moore
LEONARD P. MOORE

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

(FILED OCT 3, 1979)

APPENDIX E

(Order of the United States Court of Appeals)

Order of the United States Court of Appeals, Second Circuit, dated January 31, 1980, denying a rehearing *en banc.*

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of January, one thousand nine hundred and eighty.

STATE OF NEW YORK,

Petitioner,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

S.&E. SHIPPING CORP., SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (CONRAIL), CONAGRA INCORPORATED, PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Intervenors.

Docket No. 78-4036

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the State of New York, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

APPENDIX F

(Order of the United States Court of Appeals)

Order of the United States Court of Appeals, Second Circuit, denying petitions for rehearing.

UNITED STATES COURT OF APPEALS

For The Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of January, one thousand nine hundred and eighty.

PRESENT:

HONORABLE LEONARD P. MOORE
HONORABLE WILLIAM H. TIMBERS
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges,

STATE OF NEW YORK,

Petitioner,

—against—

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

S & E SHIPPING CORP., SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (CONRAIL), CONAGRA INCORPORATED, PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Intervenors.

78-4036

Appendix F
(Order of the United States Court of Appeals)

The Court having carefully considered the briefs of the parties filed on the petitions for rehearing, Judge Moore and Judge Van Graafeiland adhere to the holding of the majority opinion filed on May 7, 1979 and Judge Timbers adheres to the reasoning expressed in his dissent. It is therefore

ORDERED that the petitions be, and the same hereby are, denied.

/s/ Leonard P. Moore
LEONARD P. MOORE, *Circuit Judge*

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*

I dissent for the
reasons stated in
my panel decision.

/s/ WM. H. TIMBERS
USCJ

APPENDIX G

(Statute Involved)

Interstate Commerce Act (49 U.S.C. §3. par. [4]) provides:

§3. par. (4). Interchange of traffic. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

APPENDIX H

(Order of the Interstate Commerce Commission, dated May 27, 1977)

ORDER JUN 9 1977

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of May, 1977.

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WIS. TO MARTINS CREEK, PA.

Upon consideration of the record in the above-entitled proceeding including the report and order of the Commission on reconsideration, Division 2, acting as an Appellate Division, 351 I.C.C. 470 (1976); and,

It appearing, That in its decision dated March 2, 1977, the United States Court of Appeals for the Second Circuit, in *State of New York* v. *United States*, et al., No. 76-4085, found protestant lake carriers (1) subject to part III of the Interstate Commerce Act, (2) entitled to the protection of section 3(4) of the Act, and (3) protected under section 3(4) as connecting lines within the meaning of that section; accordingly, the order of the Commission was set aside and the proceeding remanded for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines;

And it further appearing, That, in compliance with the Court order, changed circumstances, including the creation of Consolidated Rail Corporation and the desirability of obtaining current data, necessitate that the record be supplemented with statements by the parties:

Wherefore, and for good cause:

Appendix H
(Order of the Interstate Commerce Commission, dated May 27, 1977)

It is ordered, That this proceeding be, and it is hereby, reopened for further administrative handling in accordance with the mandate of the Court, and that within 30 days from the service date of this order, the parties shall file supplementary statements in accordance with the Commission's General Rules of Practice, 49 CFR 1100, and that replies thereto may be filed within 20 days from the due date of the supplementary statements.

By the Commission (Commissioners Gresham and Christian not participating).

ROBERT L. OSWALD
Secretary

(SEAL)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1708

STATE OF NEW YORK,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1716

S & E SHIPPING CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1718

SEAFARERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF OF RESPONDENT CONAGRA, INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

PETER A. GREENE
900 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-8800

Attorney for Respondent ConAgra, Inc.

THOMPSON, HINE AND FLORY
Of Counsel

June, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	7
A. Those Who Are Entitled To Protection Under Section 3(4) Have No Complaint With The Decisions Below	7
B. New York's Concern About Continued Viability of the Lake-Rail Alternative Route Is Entirely Misplaced	9
C. There Is No Inconsistency Between The Opinions of the Two Panels of the Court of Appeals Who Have Considered This Case	10
D. The Decisions Below Do Not Contravene Any Statute or Public Policy and Are Entirely Consistent With Decisions of Other Courts of Appeals and Decisions of This Court	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

ICC v. *New York, N.H.&H.R. Co.*, 372 U.S. 744, 759 (1963) 12, 13

New York v. *United States*, 568 F.2d 887 (2d Cir. 1977) 5

New York v. *United States*, 600 F.2d 349 (2d Cir. 1979) 7

Unit Train Rates on Wheat; Minn. & Wis. to Martins Creek, P.A., 356 ICC 82, 91 (1978) 8, 9, 12

Western Pacific R. Co. v. *United States*, 263 F. Supp. 140 (N.D.Cal. 1966) 6, 11

Statutes and regulations:

28 U.S.C. § 1254(1) 2

Interstate Commerce Act (Recodified):

49 U.S.C. § 10701(c) 2

49 U.S.C. § 10742 2

Interstate Commerce Act (Prior to Recodification):

49 U.S.C. § 3(1) 5

49 U.S.C. § 3(4) ..... *passim*

49 U.S.C. § 15a(3) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1708

STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1716

S & E SHIPPING CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1718

SEAFARERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF OF RESPONDENT CONAGRA, INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondent ConAgra, Inc. ("ConAgra") submits that the decision of the U.S. Court of Appeals for the Second Circuit as to which review is sought presents no special or important issue that warrants issuance by this Court of the requested *writ of certiorari.*

OPINION BELOW

The opinion of the U.S. Court of Appeals as to which review is sought by petitioners is reported at 600 F.2d 349.

JURISDICTION

The decision and mandate of the U.S. Court of Appeals as to which review is sought was entered on May 7, 1979. Petitions for rehearing were timely filed and rehearing was denied by order of the U.S. Court of Appeals dated January 31, 1980.

The statutory provision pursuant to which each of the petitioners seeks review is 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the opinion of the U.S. Court of Appeals affirming a decision of the Interstate Commerce Commission ("ICC") approving unit-train grain rates presents any special or important issue warranting review by this Court.

STATUTE INVOLVED

The principal statutory provision involved in these proceedings is Section 3(4) of the Interstate Commerce Act [49 U.S.C. § 3(4)] which is set out in Appendix G to the Petition of State of New York. The provisions of Section 3(4) have during the course of the proceedings below been recodified without substantive change at 49 U.S.C. § 10701(c) and 49 U.S.C. § 10742. However, for

purposes of consistency with statutory references in the opinions below, they are referred to herein by their former designation.

STATEMENT OF THE CASE

This proceeding had its inception with the publication in September, 1973 of unit-train rates designed to make available to ConAgra efficient, reliable, uninterrupted, through movement of grain from Twin Ports (i.e., Duluth, MN and Superior, WI) and Twin Cities (i.e., Minneapolis and St. Paul, MN) grain markets to ConAgra's milling facility at Martins Creek, PA. The rates are similar to and based upon those which had previously been made available to ConAgra's competitors at Buffalo, NY. However, the particular rates which are at issue in this proceeding are applicable only to Martins Creek, PA. Since ConAgra alone has facilities at Martins Creek capable of handling grain at Martins Creek in the quantities required to qualify for the rates, only ConAgra can use them.

The rates were vigorously opposed before the ICC by numerous parties, all of whom have subsequently abandoned their opposition.[1] Following lengthy evi-

---

[1] None of the petitioners participated in the evidentiary proceedings before the ICC. S&E Shipping Corp. (under its former name of Kinsman Marine) participated in the suspension proceedings which led to the institution of the investigation proceeding which is under review by this Court. However, once the investigation was instituted, S&E advised the Commission that it had no intention of participating directly. Rather, it indicated that its interest would be represented through the Lake Carriers' Association, an organization of which it is apparently a member. By petition for reconsideration filed with the ICC on August 17, 1974, Lake Carriers' Association, speaking on behalf of S&E, advised the ICC that its objections to the unit-train grain rate would be satisfied

dentiary proceedings the lawfulness of the rates was upheld unanimously by a three-member panel of the Interstate Commerce Commission ("ICC"). Thereafter, New York State, an intervenor in the final stages of the ICC proceeding,[2] filed a petition for review with the U.S.

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if that rate were maintained at a level no lower than 88 cents per hundredweight. At the time that the petition of the Lake Carriers' Association was filed the rate in issue was published at a level of 89 cents per hundredweight. Since that time it has been increased periodically to maintain the same relationship with the cost of competitive lake-rail transportation. After the withdrawal of Lake Carriers' Association from the ICC proceedings, S&E reappeared as a petitioner for intervention in the appeal taken by New York to the U.S. Court of Appeals. Seafarers International Union of North America, AFL-CIO did not appear until the case came before the U.S. Court of Appeals for the second time in connection with the Court's review of the decision of the ICC on remand.

[2] At page 5 of its petition New York asserts that its ". . . interest arises from its duty to protect its citizens, water carriers serving its ports and others." However, it requested and was granted leave to intervene in the proceedings below only for the limited purpose of succeeding to the interests of: "the Mayor of the City of Buffalo, the County of Erie, the Niagara Frontier Transportation Authority, an agency of the State of New York, and the Buffalo Area Chamber of Commerce." In petitioning the ICC for intervention New York asserted that: "The limited resources of *those* parties and *their* many responsibilities in the many other matters makes unfeasible *their* further active participation in this proceeding. Therefore, the State of New York, as *parens patria* has undertaken to represent *their* interests, which in this case are the interests of the State as a whole. The intervention of the State of New York will prejudice no one, since the State will not in any way broaden the issues in this proceeding and other petitions for reconsideration will be filed." (Emphasis supplied).

Court of Appeals for the Second Circuit. That petition was the subject of an opinion reported at 568 F.2d 887. In that opinion, which fully details the nature of the proposed rates and the procedural steps which preceded their approval by the ICC, the Court affirmed

> . . . the Commission's order that the proposed rates do not violate § 3(1) of the Act; but, with respect to the § 3(4) claim, we set aside the order and remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

At page 6 of its petition New York asserts that:

> "The Court of Appeals found that the proposed rates did not violate Section 3(1), but found there was discrimination under Section 3(4)."

Actually, contrary to the representations of New York, the Court of Appeals did *not* make any finding of discrimination under Section 3(4). Rather, it remanded the case to the ICC to make a determination as to whether any such discrimination existed.[3]

Pursuant to the Court's remand the ICC afforded the parties an opportunity to update the record with respect to changed circumstances. After careful consideration of all relevant facts the Commission issued a decision on January 30, 1978 in which it made the following dispositive findings:

> In support of their allegation the unit-train rates to Martins Creek unjustly discriminate against connecting lake carriers at Buffalo, the protestants have shown a difference in ConRail's divisions of

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[3] Indeed, at no point has either the ICC or the U.S. Court of Appeals ever made a finding that the rates violate Section 3(4).

revenue as between the Chicago and Buffalo movements to Martins Creek, which revenue disparity cannot be justified on the basis of relative costs alone. In view of this, it becomes incumbent upon the respondents to justify the difference in rate treatment as between connecting lines by a showing of substantial differences in operating conditions and circumstances attending the two movements. See *Western Pacific R. Co.* v. *United States, supra,* at page 246, where the Supreme Court stated:

> * * * the remedy in § 3(4) situations need not entail the establishment of through routes, joint rates, or indeed any particular form of relief. All that is required is the elimination of discriminatory treatment. * * * Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the alleged discriminating carrier.* * *

In our view the evidence is convincing that the establishment of a new unit-train service over Buffalo would be inefficient, uneconomical, and counter productive and that the existence of such operating deficiencies justify the disparity in rates of divisions as between the connecting lines.

* * * *

The proposed unit-train rates from the Twin Ports and Twin Cities afford ConAgra a constant flow of grain inventory necessary for efficient flour milling at a price competitive with Buffalo millers, which result could not be attained through the availability of unit-train service from Buffalo to Martins Creek. We conclude that the institution of a comparable unit-train service from Buffalo to Martins Creek would be inefficient and uneconomical and that the disparity in rate treatment as between Chicago and Buffalo does not constitute unjust discrimination prohibited under section 3(4) of the act.

The decision of the ICC on remand was again appealed to the U.S. Court of Appeals for the Second Circuit. After full opportunity for briefing and argument the Court issued an opinion (reported at 600 F.2d 349) affirming the ICC decision on remand. Petitioners then filed petitions for rehearing and suggestions for hearing *in banc* were subsequently denied.

ARGUMENT

Petitioners assert several alleged bases for issuance by this Court of a *writ of certiorari*. Each of those reasons is totally lacking in merit.

A. Those Who Are Entitled To Protection Under Section 3(4) Have No Complaint With The Decisions Below.

In considering the contentions of the petitioners, it is important to look to the language of the statutory provision with which they contend that the decisions below are at odds. That provision, Section 3(4) of the Interstate Commerce Act, provides that common carriers by rail must afford equal treatment to their connecting lines. The language of the section goes on to specifically define the class of carriers embraced within the term "connecting line" as follows:

> "As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III."

No connecting line within the terms of that statutory definition or any party properly acting on behalf of any such connecting line has asserted any objection to the rate at issue. Petitioners vigorously but erroneously assert that water carriers engaged in transportation of bulk commodities pursuant to exemptions from the terms of the Interstate Commerce Act are entitled to the pro-

tection of Section 3(4). Such a contention is clearly at odds with the plain language of the statute.

Carriers which hold authority from the ICC are, of course, subject to the protection of Section 3(4) even where they are engaged in transportation which is exempt from ICC jurisdiction. The Commission recognized this in its decision on remand. See *Unit Train Rates on Wheat, Minn. & Wis. to Martins Creek, P.A.*, 356 ICC 82, 91 (1978). However, S&E holds no authority of any kind which would subject it to Part III of the Act with respect to *any* of its operations or activities. Nor, for that matter, has S&E established that it has ever participated in the movement of bulk grain between Twin Ports and Buffalo, although the Commission on remand provided all parties, including S&E, an opportunity to submit supplementary evidence in order to update the record. In the same manner, New York State has failed to identify a single lake carrier who considers itself to be aggrieved by the rate in issue on whose behalf New York State is purporting to act. SIU has similarly failed to identify any vessel operator by whom its members are employed who feels that it has been so aggrieved.

Indeed, the only carriers who did assert an interest in this proceeding appeared through the Lake Carriers' Association and have long since indicated their satisfaction with the non-discriminatory nature of the rate on the basis of its relationship of parity with comparable costs for movement by lake carrier. Thus, in reality, there is no legitimate case or controversy involving parties who have a justiciable interest under the provisions of Section 3(4). Rather, the Court is being called upon to issue an advisory opinion as to the applicability and scope of Section 3(4). The Court should not burden itself with such an undertaking.

B. New York's Concern About Continued Viability of the Lake-Rail Alternative Route Is Entirely Misplaced.

In its petition to the Court, New York suggests that this case is somehow of transcendental importance because the rate in issue threatens the viability of cross-lake transportation of grain and, in turn, the status of Buffalo as a major grain-handling terminal. The record upon which the ICC rendered its decision provides no basis for any such concern. The sensitivity of the ICC to the practical effect of the rate in issue was evidenced by its reopening of the record on remand in order to provide the parties with an opportunity to update the record and present evidence of actual experience under the rate. What that evidence revealed is that the volume of grain moved by lake vessel from Twin Ports to Buffalo actually increased significantly after the rate became effective. See 356 ICC at 85. Also, as the sole user of the rate, ConAgra had assured the Commission of its determination to maintain an equitable allocation of traffic as between both routings. As the Commission observed:

> ConAgra emphasizes in its supplementary statement that it is just as important to ConAgra to have lake carriers available as an alternative to rail transportation. Since the unit train rates to Martins Creek became effective, ConAgra has allocated its wheat traffic to both modes on nearly an equal basis. For example, total unit-train receipts of wheat from January 1975 through May 1977 have been approximately 4.3 million bushels while lake/rail and lake/truck receipts have been 4.5 million bushels. ConAgra sincerely believes that the present situation is one of healthy competitive balance which does not discriminate against any water carrier engaged in lake carriage of grain. (356 ICC at 88)

Thus, the rate here at issue poses no threat to the continued flow of commerce across the Great Lakes and through the Port of Buffalo and no public policy issue of such importance as to warrant the attention of this Court.

C. There Is No Inconsistency Between the Opinions of the Two Panels of the Court of Appeals Who Have Considered This Case.

In its petition, SIU attempts to create a reviewable issue where none actually exists by asserting that the second panel of the U.S. Court of Appeals to consider this case effectively overruled the decision of the first panel. Such a contention is entirely without merit. As has already been noted, neither panel of the Court of Appeals nor anyone else at any time in the course of these proceedings has ever entered a finding that the rate in issue violates Section 3(4).

The first panel of the U.S. Court of Appeals simply held that the Commission committed error in not reaching the issue of whether the proposed rates discriminate against lake carriers as connecting lines in violation of Section 3(4). The Court made no finding as to whether such discrimination existed. On remand, the Commission, in obedience to the Court's mandate, considered the issue and determined that no discrimination existed. When the decision on remand was appealed the second panel of the U.S. Court of Appeals, after carefully reviewing and thoroughly considering the Commission's decision, concluded that it was free of error in its application of the law to the facts before it.

No feature of the decision of the second panel is in any way in conflict with the decision of the first panel.

D. The Decisions Below Do Not Contravene Any Statute or Public Policy and are Entirely Consistent With Decisions of Other Courts of Appeals and Decisions of This Court.

Each of the petitioners cites the principal cases standing for the proposition that a rail carrier cannot refuse to accord equal treatment to all of its connecting lines. We take no issue with that proposition since it is clearly provided for in Section 3(4). However, the arguments of petitioners which are predicated upon that proposition overlook the very fundamental fact that all connecting lines are treated equally at Buffalo. The lowest rail rate applicable on grain moving from Buffalo to Martins Creek is the so-called five-car rate. That rate applies on rail movement from Buffalo to Martins Creek of grain which has arrived at Buffalo by rail, by water, or by any other means of transportation.

The five-car rate is, of course, significantly higher on a prorated per-mile basis than ConRail's division of the unit-train rate which is at the heart of this dispute. Petitioners contend that this fact alone is sufficient to render the unit-train rate unlawful. In essence, they argue that the revenue return realized by ConRail on the five-car rate from Buffalo to Martins Creek provides an absolute and unyielding standard against which all other rates to Martins Creek must be measured for the purpose of determining whether they comport with the requirements of Section 3(4). This is simply not the law.

As the Commission properly concluded, in reliance upon *Western Pacific Railroad Co.* v. *United States*, 263 F. Supp. 140 (N.D.Cal., 1966), any disparity in the revenue realized by ConRail in the two rates can be justified ". . . by differences in operating conditions that substantially affect the alleged discriminating carrier." Here, the differences in conditions are patent and substan-

tial. They were explained in detail by the ICC and need not be repeated. See 356 ICC at 92-93.

What is really at issue here is the right of Conrail to compete with the lake carriers for grain traffic. The case is actually one involving intermodal competition over parallel routes. The meaningless relationship between a five-car rate applicable to all grain traffic moving from Buffalo to Martins Creek and a unit-train rate which does not even traverse Buffalo is little more than a diversion from the real issue of whether the unit train rate improperly undercuts the competitive water-rail rate.

Where such an intermodal comparison is involved Conrail need only establish that the unit-train rate is compensatory. The rate here in issue has been found by the Commission to be fully compensatory and no one has challenged that finding. As this Court stated in *ICC* v. *New York, N.H.&H.R. Co.*, 372 U.S. 744, 759 (1963):

> "If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate."

The Court went on to hold that

> ". . . if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. Of course, when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue."

Here, the rail respondents unequivocally established that the rate in issue is just and reasonable from a revenue standpoint. At that point, under the rule enunciated by this Court, the burden shifted to any protesting water carrier who felt that it was injured by the rate to "bring forward the data relating to its own costs." No such carrier presented any such evidence during the extensive evidentiary proceedings before the ICC. Even when the Commission reopened the record on remand, neither S&E nor any other water carrier nor anyone purporting to act on behalf of any other water carrier presented any evidence which would support a conclusion that the lake carriers have any "inherent cost advantage" with respect to the traffic here in issue. Thus, under the standard prescribed by Congress in Section 15a(3) of the Interstate Commerce Act and applied by this Court in *ICC* v. *New York, N.H.&H.R. Co.*, 372 U.S. 744, 759 (1963), the ICC acted with complete propriety in upholding the lawfulness of the rate in issue and the U.S. Court of Appeals acted with equal propriety in affirming that decision.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

PETER A. GREENE
900 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-8800

Attorney for Respondent
ConAgra, Inc.

Supreme Court, U.S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

Nos. 79-1708, 79-1716, 79-1718

STATE OF NEW YORK,
Petitioner in No. 79-1708,

S. & E. SHIPPING CORPORATION,
Petitioner in No. 79-1716,

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner in No. 79-1718,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents,

and

PENNSYLVANIA PUBLIC UTILITIES COMMISSION, CONSOLIDATED RAIL CORPORATION, SOO LINE RAILROAD COMPANY and CONAGRA, INCORPORATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, PA 19104
(215) 977-5012
Attorney for Respondent Consolidated Rail Corporation

Due Date: June 21, 1980

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITIONS FOR A WRIT OF CERTIORARI	4
I. Petitioners Misstate the Question Presented to This Court	4
II. Rates Which Differ Between Common Junction Points But Which Are the Same From Each Junction Point Regardless of the Inbound Mode Do Not Violate Section 3(4) of the Act	8
CONCLUSION	11

TABLE OF CASES

Page

Arrow Transp. Co. v. United States, 176 F. Supp. 411 (1959) 8

Chicago, Rock Island & Pacific R. Co. v. United States, 233 F. Supp. 381 (1964) 8, 9

I.C.C. v. Mechling, 330 U.S. 567 (1947) 7, 8, 9

Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (1964) 8, 10

Western Pacific R. Co. v. United States, 382 U.S. 237 (1965); 263 F. Supp. 140 (1966) 8, 10

TABLE OF AUTHORITIES

Interstate Commerce Act:

National Transportation Policy (49 U.S.C. 10101) 9

Section 1 (49 U.S.C. 10701(a)) 4, 5

Section 2 (49 U.S.C. 10741(a)) 9

Section 3(1) (49 U.S.C. 10741(b)) 2, 3, 5

Section 3(4) (49 U.S.C. 10701(c)) 1,2,3,4, 5, 6, 7, 8, 9, 10

QUESTION PRESENTED

Are the requirements of Section 3(4) satisfied when the railroad assesses equal charges as between inbound modes of transportation at each common junction point.

STATEMENT OF THE CASE

Roughly seven years ago, two railroads, Soo Line and Erie-Lackawanna, now Consolidated Rail Corporation (Conrail), established certain all-rail rates for the transportation of wheat from the Twin Cities area to Martins Creek, Pennsylvania. The establishment of the rates followed the installation of milling facilities by Conagra, Inc. at Martins Creek. For many years, the Buffalo milling interests have had the best of all possible worlds. There were no flour milling facilities to the east thereof, and they had ready access to inbound wheat by rail, water and truck. They had, in short, a virtual monopoly in the trade. Martins Creek, however, is much closer than Buffalo to the flour buyers in the major population centers on the East Coast, and the operation of a flour mill at that point constituted a competitive affront to the flour milling industry at Buffalo, as well as to the lake carriers and Buffalo port interests who regarded the eastbound traffic as their private preserve.

Conagra had no milling or storage facilities for wheat at Buffalo. Rather, it was wholly dependent for such services upon its Buffalo competitors. Small wonder that it sought alternative means of distributing flour at lower prices to the East Coast bakeries. Less wonder that the Buffalo milling interests—accompanied by lake carriers serving Buffalo and, eventually, the State of New York (New York)—would resort to litigation in an effort to forestall Conagra's competitive move.

After an investigation of petitioners' complaints against the all-rail movement from the Twin Cities, the Commission concluded that the petitioners had failed to sustain a case of undue discrimination under former Section 3(1) (49 U.S.C. 10741(b)) and that the unregulated lake carriers were not "connecting carriers" entitled to protection from discrimination under former Section 3(4)

(49 U.S.C. 10701(c)). The first opinion of the Second Circuit sustained the Commission's opinion as to Section 3(1), but, concluding that at least some of the lake carriers, although "unregulated" in the transportation of wheat, were nevertheless "certificated" under Part III of the Act and thus "connecting carriers" under Section 3(4), the Court remanded the subject to the Commission for a determination as to whether a violation of Section 3(4) existed.[1]

The thrust of the 3(4) complaint was that Conrail's Buffalo-Martins Creek rate was the only rate available to the lake carrier in lake-rail transportation from the Twin Cities to Martins Creek, whereas Conrail also participated in an all-rail rate with the Soo Line to Martins Creek via Chicago wherein Conrail accepted a lower rate (division), mile for mile, than it assessed on ex-Buffalo movements. While Conrail's ex-Buffalo rate was available to all traffic regardless of inbound mode of carriage, its ex-Chicago division was not initially open to inbound lake wheat at Chicago.

Since the gravamen lay in the alleged nonavailability of the ex-Chicago division to inbound lake traffic at that point, Conrail offered to the lake carriers the same ex-Chicago arrangement then and now available on inbound ex-Soo Line traffic at the same junction. The Commission thereupon observed that:

> "Since it appears that ConRail now stands ready and willing upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago, there appears to be no violation of Section 3(4) of the Act." (A-43).

The court below sustained the Commission.

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1. Contrary to petitioner New York (p. 6), the Second Circuit did not find that Section 3(4) discrimination existed. See A-22 (Petitioner's Appendix, p. 22).

REASONS FOR DENYING THE PETITIONS FOR A WRIT OF CERTIORARI

I

Petitioners Misstate the Question Presented to This Court

One might well ask why petitioners pursue this litigation in view of Conrail's standing offer to transport ex-lake wheat from Chicago to Martins Creek on the same conditions and at the same rate (division) which it now assesses against ex-Soo Line wheat for the same movement. Given that circumstance, ex-lake wheat stands on precisely the same footing as ex-rail wheat, whether it is tendered to Conrail at Buffalo or at Chicago. As the court below noted, the water carrier may "prefer" Buffalo over Chicago (A-51, Ft. 4), but Section 3(4) requires only that Conrail provide equality at each junction point; it does not require deference to the connecting carrier's preferences.

The answer to the inquiry posed above is that the end result sought by petitioners is not equality of rates between connecting lake and rail carriers, but rather the elimination of the all-rail rate from the Twin Cities to Martins Creek. Only that result would suitably impair—if not altogether eliminate—all-rail competition during the summer, the new Conagra milling operation and the promise of lower prices on flour to the East Coast baking industry.[2]

For that reason, petitioners' questions are couched in terms of alleged unlawfulness of the "all-rail rate" from the Twin Cities vis-a-vis the rail leg of the lake-rail move via Buffalo, thus blurring the distinction between charges of unlawfulness under Sections 1 (49 U.S.C. § 10701(a))

2. In fact, petitioner Seafarers International Union requests this Court to cancel the all-rail rates (p. 13).

and 3(1), on the one hand, and Section 3(4) on the other. For example, New York's question to the Court is addressed to "a disparity in freight rates between carrying wheat on *all-rail rates* and carrying wheat from a connecting lake carrier" (p. 2), and S&E's question is "whether the railroad *unit train rates* in issue discriminate unlawfully against Great Lakes water carriers . . . as connecting carriers at Buffalo, New York in water rail competition for carrying wheat from the north central states" (p. 2). These would be appropriate questions if the issues before the Court involved reasonableness under Section 1 or discrimination as between places, persons or ports under Section 3(1). The Commission, however, decided these very issues adversely to the petitioners, and the agency's opinion therein was sustained by the court below, except with respect to the question of "connecting carriers" under 3(4). The lawfulness of the all-rail rates therefore is not in issue here.

The distinction between a 3(1) and a 3(4) complaint is easily grasped by using a parallel hypothetical. Assume that the same all-rail rate from the Twin Cities to Martins Creek were provided by Soo Line in single line service and that Conrail's only participation lay in the movement from Buffalo to Martins Creek. The competitive situation of Conagra vis-a-vis the Buffalo millers would be exactly as it is today, but this litigation would be over. While petitioners may have assailed the Soo Line's all-rail rate under former Sections 1 and 3(1), there would be no basis whatsoever for a Section 3(4) allegation predicated upon a disparity in treatment between connecting carriers, since the Soo Line movement would not involve any connections and Conrail's ex-Buffalo rate applies regardless of inbound mode.

It is only because of Conrail's participation in the all-rail rate and its connection with Soo Line at Chicago

that enabled petitioners to raise the 3(4) issue before the Commission, and, in sharp contrast to petitioners' arguments with respect to the "all-rail" rates here, their contentions before the Commission were expressly directed to a comparison between Conrail's earnings from its ex-Chicago division of the all-rail rate vis-a-vis its earnings from its ex-Buffalo rates.

For example, in its Supplemental Opening Argument filed with the Commission, New York described the discrimination complained of as:

> "the disparity between the rail rate applicable to the intermodal route from Buffalo to Martins Creek when compared to the rail rate applicable *to that portion of the all-rail route from Chicago to Martins Creek.*" (JA, p. 21)[3],

and its brief to the court below spelled out the 3(4) grievance with this:

> "In short, Conrail still charges twice as much to transport 100 pounds of wheat one mile when it connects with a water carrier at Buffalo than when it connects with another railroad [at Chicago]."

S&E's presentation reflected the same premise:

> [a demand for] "a disproportionately higher charge for grain ex-lake carriers *than . . . for the Erie portion of the all-rail proposed rate.*" (JA, pp. 58-59)

And this is exactly the context in which the Commission considered the issue:

> "In support of their allegation the unit train rates to Martins Creek unjustly discriminate against connect-

3. JA refers to the Joint Appendix filed with the Court of Appeals.

> ing lake carriers at Buffalo, the protestants have shown a difference in Conrail's *divisions of revenue* as between the Chicago and Buffalo movements . . ." (A 40)

Petitioners' views above as to the offending disparity, of course, were expressed prior to the point at which Conrail issued its standing offer to place the lake carriers on an equal footing with the Soo Line at Chicago. With that offer, any disparity in ex-rail versus ex-water charges disappeared. Hence, the imprecise nature of petitioners' "Questions" to this Court, which, in turn, permits them—at least as they see it—to indulge in the lurid prose which normally attends the subject of "destructive competition," in this case, the imminent demise of lake carriage and the Buffalo milling industry with substantial, if not fatal, injury to the Empire State.

Charges of this nature, however, are not relevant in a 3(4) dispute. *Mechling, infra,* views 3(4) as requiring equality, regardless of consequence. The duty of the responding carrier ends when equal opportunity has been provided. In this instance, Conrail has left the choice of junction point to the lake carrier, which, in turn, is assured that whatever the choice, its traffic will move via Conrail beyond the junction point selected to Martins Creek on the same basis available to the traffic handled by the competing inbound rail carrier. Whatever "inherent advantage" is held by the lake carrier on the water movement to either Chicago or Buffalo will remain intact.

Having brought the issue into precise focus, application of the case law is simple.

II

Rates Which Differ Between Common Junction Points But Which Are the Same From Each Junction Point Regardless of the Inbound Mode Do Not Violate Section 3(4) of the Act

The decisions cited broadly by petitioners are those generally recognized as established precedent in cases of alleged discrimination between connecting carriers at common and non-common junction points, *Mechling*,[4] *Arrow*,[5] *Western Pacific*,[6] *Seatrain*,[7] and *Rock Island*,[8] but a careful review of these opinions discloses only that Conrail has complied fully with all of the conditions therein imposed.

In this instance, there are two separate junction points, Buffalo and Chicago, each of which is common to both rail and lake inbound carriers. The rate from Buffalo to Martins Creek was established well before the publication of the contested all-rail adjustment. It applies equally on all ex-Buffalo traffic, regardless of inbound mode, and is not in issue here, except as it became petitioners' predicate for the Section 3(4) allegation. The gist of the complaint is that while Conrail's ex-Chicago *division* out of the through all-rail rate is higher than the *rate* it maintains from Buffalo to the same destination, it is relatively lower, distance considered, i.e., Conrail's earnings per car mile

4. *I.C.C. v. Mechling*, 330 U.S. 567 (1947).

5. *Arrow Transp. Co. v. United States*, 176 F. Supp. 411 (1959).

6. *Western Pacific R. Co. v. United States*, 382 U.S. 237 (1965); 263 F. Supp. 140 (1966).

7. *Seatrain Lines, Inc. v. United States*, 233 F. Supp. 199 (1964).

8. *Chicago, Rock Island & Pacific R. Co. v. United States*, 233 F. Supp. 381 (1964).

from Chicago to Martins Creek are lower than those accrued on the ex-Buffalo movement. From this, petitioners argue that since Conrail's division east of Chicago applied only in connection with the inbound Soo Line movement to that point, the lake carriers were discriminated against and deprived of their "inherent advantage" contrary to the National Transportation Policy. This approach conveniently ignores the fact that Conrail's standing offer to transport ex-lake grain from Chicago at the same rate—or division—which it assesses against ex-Soo Line traffic eliminates the disparity complained of and is in full accord with the law according to *Mechling*.

In the view of the *Mechling* court, the National Transportation Policy and Sections 2 and 3(4) of the Act:

> "flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-East railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains *to and from the same localities,* unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." (330 U.S., p. 577).

Arrow is cited at length in *Rock Island*, and the following excerpt from the latter opinion is dispositive here:

> "In either event, the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic *from the same port to the same destination.*" (233 F. Supp., p. 384).

Conrail has applied that "yardstick" east of Chicago and east of Buffalo to both ex-rail and ex-lake inbound wheat for Martins Creek moving via either junction point.

The *Western Pacific* decisions are not in point here. They emphasize only that a direct connection is not necessary to establish standing as a "connecting carrier" under Section 3(4) and that the burden of justifying a difference in treatment between connecting lines lies with the carrier responsible for maintaining the difference. Given Conrail's standing offer to assess equal charges against both ex-rail and ex-lake traffic at either junction point, there is no difference in treatment requiring justification.

Unlike the case at bar, *Seatrain* involved a complaint against alleged discrimination between connecting water and rail carriers at non-common junction points. That question does not arise where, as here, each junction point is common to both inbound rail and barge and the rates beyond each junction point are the same regardless of the inbound mode.

CONCLUSION

Equal charges are available to wheat moving beyond either junction point to Martins Creek, regardless of the inbound mode utilized. Any inherent advantage by water remains intact. There remains no issue meriting the writ.

The petitions should be denied.

Respectfully submitted,

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, PA 19104
(215) 977-5012
Attorney for Respondent
Consolidated Rail Corporation

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IN THE

Supreme Court of the United States

No. 79-1708

STATE OF NEW YORK,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 79-1716

S & E SHIPPING CORP.,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 79-1718

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

BRIEF OF RESPONDENT SOO LINE RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

C. HAROLD PETERSON
Attorney for
Soo Line Railroad Company
804 Soo Line Building
Minneapolis, Minnesota 55440
Telephone (612) 332-1261, Ext. 284

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT:	
Limited Interest of Petitioners	9
No Violation of § 3(4) Shown by Petitioners	12
Other Allegations are not Properly Before the Court	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Arrow Transportation Co. v. United States, 176 F. Supp. 411 (1959), aff'd. 361 U.S. 353 (1960) ... 13
Atlantic Coastline Railroad Co. v. United States, 205 F.Supp. 360, aff'd. 371 U.S. 6 (1962) 13
Pittsburg & W. V. Ry. Co. v. United States, 41 F.2d 806 (1929) 13
State of N.Y. v. United States, 568 F.2d 887 (1977) . 5
Unit Train Rates on Wheat, Minn. & Wis, to Martins Creek, Pa.: ICC Investigation & Suspension Docket No. 8899 3

Interstate Commerce Act:

49 U.S.C. § 3(4) 2, 5, 6, 7, 8, 11, 12, 13, 14, 15, 17
49 U.S.C. § 10101 16
49 U.S.C. § 10701(c) 2
49 U.S.C. § 10742 2

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BRIEF OF RESPONDENT SOO LINE RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The State of New York, S & E Shipping Corp. and Seafarers International Union of North America, AFL-CIO, have petitioned this Court for issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed an order of the Interstate Commerce Commission.[1] The Commission's decision (reproduced in New York's Petition as Appendix B) affirmed the lawfulness of unit train rates on grain moving from Minneapolis-St. Paul, Minnesota and Duluth, Minnesota-Superior, Wisconsin to Martins Creek, Pennsylvania. Specifically, the Commission found said unit train grain rates did not violate Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4))[2] which prohibits discrimination in rates, fares and charges between connecting lines including "any carrier subject to the provisions of this chapter or any common carrier by water subject to Chapter 12 of this title" (also known as "part III" of the Interstate Commerce Act).

QUESTION PRESENTED

Whether Conrail's division of unit train grain rate from origins west of Chicago, Illinois to Martins Creek, Pennsylvania, which it has offered to publish on ex-lake traffic from Chicago, Illinois, violates §3(4) of the Interstate Commerce Act because it produces lower earnings per

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[1]A panel of the Court affirmed the Commission order by decision dated May 7, 1979, Judge Timbers dissenting. On January 31, 1980 the Court denied petitions for rehearing and rehearing en banc. (See App. C, E and F attached to New York Petition.)

[2]As recently recodified the substance of § 3(4) is now found in 49 U.S.C.10701(c) and 10742. Subsequent references to provisions of the Act will identify appropriate sections thereof prior to recodification.

mile than a 5-car grain rate from Buffalo, New York to Martins Creek, Pennsylvania.

STATEMENT OF THE CASE[3]

In the fall of 1973 the Soo Line Railroad Company and Erie Lackawanna Railroad Company (now Conrail) published summer and winter unit train wheat rates from the Twin Ports (Duluth-Superior) and the Twin Cities (Minneapolis-St. Paul) to Martins Creek, Pennsylvania. The summer and winter rate levels (originally 72.25¢ and 88¢ per cwt.) were established through negotiations with ConAgra, Inc., a milling company which had recently established a flour mill at Martins Creek, Pennsylvania, to meet that shipper's alternative transportation costs in moving wheat from Duluth to Martins Creek. Specifically, the summer rate level was designed to meet ConAgra's alternative transportation cost in moving wheat from Duluth to Martins Creek by water-rail or water-truck over Buffalo, New York.

As a result of protests to the proposed rates being filed by numerous parties, including Lake Carriers' Association and the Great Lakes Shipowners' Association, the Interstate Commerce Commission suspended the proposed rates for seven months and conducted an investigation into their lawfulness.[4] In the initial Commission investigation proceeding, ICC Docket I&S 8899, Lake Carriers' Association appeared and introduced evidence in opposition to the

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[3]While the sole legal issue properly raised by petitioners is not complex, a complete description of the involved unit train rates, the proceedings before the Commission, and the Appeals Court's decisions is essential to place that issue and the petitioners' interest therein in proper focus.

[4]The summer and winter rates have been in effect, subject to frequent escalations, since June 1, 1974.

proposed rates. The Great Lakes Shipowners' Association never participated in the Commission hearings or subsequent proceedings.

By Decision served July 18, 1974, Division 2 of the Commission upheld the lawfulness of the winter rate from both origin areas and the summer rate from the Twin Ports to Martins Creek. A majority of Division 2, however, found the summer rate from the Twin Cities to Martins Creek to be unlawful.

The proponent railroads and ConAgra petitioned the Commission for reconsideration of that part of its decision finding the Twin Cities-Martins Creek summer rate to be unlawful. The State of New York, which intervened in the proceedings *on behalf of Buffalo interests* after the Commission record had been closed, and Lake Carriers' Association petitioned for reconsideration of the Commission's decision finding the summer rate from the Twin Ports to Martins Creek to be lawful.

The petition for reconsideration filed by Lake Carriers' Association stated in part:

> "Protestant Lake Carriers' Association accepts respondents' premise that, in setting the level of the proposed rate, respondents do not intend to go any lower than necessary to meet the alternative transportation cost to the shipper. In essence, *as long as the alternative costs to the shipper all-rail versus lake-rail are equivalent, the lake carrier industry has no objection.*" (Emphasis supplied)

Lake Carriers' reconsideration petition also stated that the 1974 summer rate level "should not be pegged any lower than 88¢" due to increased lake costs occurring subse-

quent to the fall of 1973. As of the summer of 1974 when Lake Carriers' petition was filed, the summer unit train rate had been increased to 89¢ per cwt., *one cent higher than that advocated by the only party in the Commission proceedings representing the interests of lake carriers.*

By Report and Order served February 11, 1976, the Interstate Commerce Commission affirmed the prior Division 2 decision finding the winter rate and the summer rate from the Twin Ports to Martins Creek to be lawful. It reversed the prior decision's finding with respect to the summer rate from the Twin Cities to Martins Creek. Thus the Commission's final decision upheld the lawfulness of both summer and winter rate levels from both origin areas to Martins Creek, PA.

The Commission's 1976 decision was reviewed by the United States Court of Appeals for the Second Circuit in *State of N.Y. v. United States*, 568 F.2d 887 (1977), following the filing of a review petition by the State of New York. That decision remanded the matter to the Commission "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines" (568 F.2d 898) in violation of Section 3(4).[5]

Following the Court's remand the Commission afforded all interested parties the opportunity to supplement the

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[5]While the Court's first decision states that *"Exempt Water Carriers are entitled to Section 3(4) Protection"* (568 F.2d 894), it only faulted the Commission for its apparent conclusion "that carriers exempted from regulation when they carry commodities in bulk[14] are not 'subject to part III' for purposes of protection under § 3(4)" (id at 895). Footnotes 13 and 14 of the Court's decision (ibid) clearly reflect its recognition that *§ 3(4) does not afford any protection to water carriers which hold no Commission authority to transport commodities by water in interstate commerce.*

record and to reply to opening statements filed by opposing parties. The supplemental statement filed on behalf of Conrail clearly demonstrated the rail rate from Buffalo to Martins Creek "applies on all traffic regardless of inbound mode." Furthermore ConRail assured the Commission it was "ready, willing and able to consider any proposal for the movement of the traffic in question when received ex-water via Chicago on the same basis it presently extends to its rail connection."

The statement filed on behalf of the Soo Line demonstrated that Lake Carriers' Association represented only one water carrier having a certificate of public convenience and necessity issued by the Commission. However Commission records did not indicate that carrier had any interest in transpotration of grain.[6] The only water carrier actively participating in the reopened Commission proceedings following the Court's remand was S & E Shipping Corporation, *a water carrier having no part III authority from the Commission.*

By Report and Order served January 30, 1978 the Commission, in compliance with the Court's remand order, carefully reviewed the issue of whether the unit train rates violated Section 3(4) of the Act. The Commission specifically recognized "that part III water carriers are entitled to the protection of section 3(4) although their carriage of wheat in bulk exempts them from regulation under section 303(b) of the Act." The Commission correctly

[6]While certain water carriers represented by Great Lakes Shipowners' Association held certificates issued under Part III of the Interstate Commerce Act, the Association did not participate in the Commission proceedings after filing its suspension petition in 1973. The 1976 annual report of the regulated carriers represented by Great Lakes Shipowners' Association clearly indicated those water carriers have no interest in the transportation of grain on the Great Lakes.

found that differences in operating conditions and circumstances justified Conrail's refusal to publish unit train rates from Buffalo, New York to Martins Creek, Pennsylvania reflecting the same revenue per mile as its division of the through unit train rates from Minnesota-Wisconsin origins to Martins Creek. That Commission finding is fully supported by the record developed in both Commission proceedings.

The Commission then concluded:

> "What has been said above with respect to Buffalo does not apply to the route via Chicago to Martins Creek. Inasmuch as the operating conditions attending the ex-rail movements of grain from Chicago to Martins Creek would be substantially similar to those attending ex-lake rail movements from Chicago to Martins Creek, a refusal by Conrail to participate in joint rates and through routes with the connecting lake carriers on ex-lake wheat shipments from Chicago to Martins Creek on the same basis as accorded Soo in connection with the all-rail route would unjustly discriminate against connecting part III water carriers in violation of section 3(4) of the Act. Conrail states that it has received no request from any lake carrier seeking like rate treatment on ex-lake wheat shipments from Chicago to Martins Creek, and this averment has not been disputed by the protestants. *Since it appears that Conrail now stands ready and willing, upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago, there appears to be no violation of section 3(4) of the Act.*" (Emphasis supplied)

Following the filing of petitions for review of the Commission's January 30, 1978 report and order by the

State of New York and S & E Shipping Corporation, the Commission's decision was affirmed by a majority panel of this Court, Judge Timbers dissenting. Concerning the petitioners' allegation that the five car 40¢ per cwt. rate from Buffalo, New York to Martins Creek, Pennsylvania was discriminatory because it reflected higher per mile earnings than Conrail's division of the through unit train rate to Martins Creek, the Court's second decision noted:

> "The rate eastward from Buffalo was the same, however, regardless of whether the grain movement into Buffalo from the west was by ship, rail or truck. Clearly no carrier from the west could claim that it was being discriminated against because of the higher Buffalo to Martins Creek rate."

The Court went on to note that the proposed unit train rate had been challenged in the initial hearings before the Commission:

> ". . . because similar unit-train rates were not made available to elevators in Chicago. Their contention that this unavailability violated sections 4(1) and 3 (1) of the Act was rejected by the Commission. Following remand, however, the Commission held that operating conditions attending ex-rail and ex-lake movements of grain from Chicago to Martins Creek would be substantially similar and that it would be a violation of section 3(4) if Conrail refused to participate in joint rates and through routes with lake carriers at Chicago on the same basis as it did with the Soo Railroad. Conrail has indicated its willingness to do so. However, no request for such service has yet been made by any lake carrier."

The Court also found the Commission "properly received additional evidence as to the effect of the disputed tariffs" and stated:

> "This showed that, between 1973 and 1976 annual shipments of wheat to Buffalo by lake carrier increased by over 16.5 million tons, or approximately fifty percent. It disclosed also that despite the adoption of the challenged unit-train rates, about fifty percent of ConAgra's wheat requirements are still transported by lake carrier and seventy percent of all grain movements from Buffalo to Martins Creek are by truck. This evidence gives little support by petitioner's claim of discrimination."

Accordingly, the petition for review was denied and the Commission's January 18, 1978 order was affirmed.

On January 31, 1980 the United States Court of Appeals for the Second Circuit denied petitions for rehearing and rehearing en banc which had been filed by petitioners herein.

REASONS FOR DENYING THE WRIT

Limited Interest of Petitioners

In the first review proceedings before the Court of Appeals the State of New York alleged that "[i]t stands in *parens patria* to the vessels calling at ports in New York State and the millers located in New York State" (New York brief to the Court, dated June 10, 1976). In fact, the State of New York was never authorized to represent either flour millers located in the state of New York or water carriers serving the Great Lakes in either the proceedings before the Commission or the review cases con-

sidered by the United States Court of Appeals for the Second Circuit. To the contrary, New York was permitted to intervene in the Commission proceedings for the limited purpose of representing "the Mayor of the city of Buffalo, the county of Erie, the Niagara Frontier Transportation Authority, an agency of the state of New York and the Buffalo area Chamber of Commerce."

Several flour milling companies having facilities at Buffalo, New York were represented by separate counsel in the Commission proceedings but chose not to seek judicial review of either of the Commission's final decisions. Great Lakes water carriers were also represented by separate counsel in the Commission proceeding but, with the exception of S & E Shipping Corp. discussed below, took no part in the judicial review proceedings. In fact, as previously noted, the petition for reconsideration which Lake Carriers' Association filed with the Commission in the summer of 1974 stated that the summer rate level "should not be pegged any lower than 88¢" at a time when said rate had been increased to 89¢ per cwt. Lake Carriers' petition for reconsideration to the Commission concluded:

> "In essence, as long as the alternative costs to the shipper all-rail versus lake-rail are equivalent, the lake carrier industy has no objection."

While New York continues to claim that it represents the interests of all of its citizens, including water carriers and flour millers, its authority to represent other interests, which originally derived from the petition for intervention which it filed in the Commission proceedings, is much more limited. In fact, as noted by amicus briefs being filed

herewith, the position taken by the State of New York in this proceeding is contrary to the position of at least two flour milling companies located in the state of New York, including one company having a flour mill located in the city of Buffalo.

The standing of S & E Shipping Corp. to seek the issuance of a writ of certiorari is even more tenuous. S & E Shipping represented to the United States Court of Appeals in its motion for leave to intervene in the first review case, that it "is the successor in interest to the Kinsman Marine Transit Company, which was a party to this [Commission] proceeding." However, while Kinsman Marine filed a "Protest and Petition for Suspension and Investigation" of the proposed unit train rates on October 23, 1973, counsel for Kinsman Marine advised the Commission, by letter dated January 16, 1974, that it was "withdrawing as a party to the proceeding. Kinsman will pursue its interest in this matter as a member of the Lake Carriers' Association another protestant in this proceeding." Lake Carriers' Association, as noted above, advised the Commission in the summer of 1974 it had no objection to the level of the summer unit train rate.

S & E Shipping, as successor in interest to Kinsman Marine Transit Co., should have been bound by the Lake Carriers' Association statement of position set forth above insofar as the § 3(4) discrimination issue now before this Court is concerned. Furthermore, it is highly significant that S & E Shipping vigorously asserted throughout the two proceedings before the United States Court of Appeals that it was not subject to part III of the Interstate Commerce Act because it held no water carrier authority from the Interstate Commerce Commission. Consequent-

ly, because S & E Shipping is not a "connecting line" within the context of § 3(4) of the Act it has no standing to claim protection under that provision.

The remaining petitioner, Seafarers International Union of North America, AFL-CIO, also failed to show any legitimate interest in the subject covered by its petition for writ of certiorari. Its petition to this Court is completely silent on that point. While presumably Seafarers Union is the collective bargaining representative for certain seafarers operating on the Great Lakes, it has never made any representation to the Commission or the Court below as to how its membership could be affected by an order of the Interstate Commerce Commission upholding the lawfulness of certain unit train grain rates.

No Violation of § 3(4) Shown by Petitioners

In strict compliance with the Court's prior remand, the Commission's January 18, 1978 decision carefully considered the question of whether the summer unit train rate discriminated against connecting lines in violation of § 3 (4) of the Act. It found that no discrimination existed at Buffalo, New York since the applicable rail rate from Buffalo to Martins Creek, Pennsylvania was identical whether grain moved inbound to Buffalo by rail or by water. It found there was a potential for § 3(4) discrimination at Chicago since Conrail's division of the unit train rate for handling traffic from Chicago to Martins Creek was less than the rate which would be charged if grain were delivered to Conrail at Chicago by a water carrier. However, as previously noted, the Commission's January 18, 1978 decision then concluded:

> "Since it appears that Conrail now stands ready and willing, upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago. there appears to be no violation of section 3(4) of the Act."

In affirming this decision the Appeals Court expressly recognized that water carriers seeking to interchange grain with Conrail *at either Chicago* or *Buffalo* would be entitled to the same rate for movement to Martins Creek, Pennsylvania as was available to Conrail's rail connections at those points. Accordingly, following *Pittsburgh & W. V. Ry. Co. v. United States,* 41 F.2d 806 (1929), *Atlantic Coastline Railroad Co. v. United States,* 205 F. Supp. 360, *aff'd,* 371 U.S. 6 (1962), and *Arrow Transportation Co. v. United States,* 176 F.Supp. 411 (1959), *aff'd,* 361 U.S. 353 (1960), the Court affirmed the Commission's decision. Relying specifically on *Arrow Transportation Co.,* the Court stated:

> "With respect to lake traffic, the yardstick for measuring discrimination is 'the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination' [citing *Arrow Transportation Co.*]. The Commission was satisfied in this case that, where comparable conditions between lake and rail carriers existed, equal rate treatment was available and that, accordingly, there was no violation of section 3(4)."

While the petitioners herein do not dispute the Commission's finding, specifically affirmed by the lower court, that identical outbound rail rates from both Chicago and Buffalo are available regardless of how traffic moves in-

bound to those ports, New York's petition concerning this subject is extremely misleading.

At page 8 of its petition New York first alleges that "S & E Shipping Corporation, a lake carrier, is protected by section 3(4) and is discriminated against."[7] New York then alleges that the "discrimination" against S & E Shipping "is that Conrail charges twice as much per mile when it connects with the lake carriers at Buffalo than when it connects with another railroad."

Phrased less artfully, an accurate description of the position taken by New York and its co-petitioners would be: A section 3(4) violation exists because:

> "Conrail charges twice as much per mile under an applicable 5-car rate from Buffalo, New York to Martins Creek, Pennsylvania (a distance of 340 miles) as it charges in moving 50-car unit trains from Chicago, Illinois to Martins Creek (a distance of 910 miles)."

While the foregoing restatement of petitioners' position accurately reflects the facts developed in the Commission proceedings and accepted by the Court of Appeals, it completely fails to demonstrate the existence of any § 3 (4) discrimination at either Buffalo, New York or Chicago, Illinois. Nevertheless, this is the principal thrust of the § 3(4) argument contained in the petitions filed with this Court.

In essence, each of the petitions seeking the issuance of a writ of certiorari contends a per se violation of § 3(4) of the Act exists because Conrail's division of the unit train rate from western origins to Martins Creek returns

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[7]As previously noted, this statement is incorrect. S & E Shipping, which holds no common carrier authority from the Interstate Commerce Commission, is not a "connecting line" within the context of § 3(4).

less revenue per mile or per ton mile than does Conrail's 5-car rate from Buffalo to Martins Creek. The novel rate-making concept advocated by New York, et al. finds absolutely no support in § 3(4) of the Interstate Commerce Act which, as relevant herein, merely prohibits discrimination against "connecting line" water carriers at given Great Lakes ports.

The unit train rate here involved was published to permit the railroads to compete for a portion of the grain traffic moving from Duluth-Superior to Martins Creek which would *all* move lake-rail or lake-truck via Buffalo, New York if the unit train rate were cancelled. It was supported by ConAgra, the milling company located at Martins Creek, Pennsylvania, because the unit train rate afforded that company competitive transportation alternatives. The position espoused by petitioners herein, that the unit train rate is unlawful so long as it produces less revenue per mile than that realized by Conrail in moving grain from Buffalo to Martins Creek, would completely deprive the Soo Line of the ability to compete for any portion of this traffic to its detriment and that of the shipper who desires to preserve its present transportation alternatives. Application of this anti-competitive principle in the instant case, where the sole beneficiary would be exempt water carriers having no authority from the Interstate Commerce Commission, would be particularly egregious.

Other Allegations are not Properly Before the Court

The petitions filed by both S & E Shipping Corp. and Seafarers contain extensive argument supporting their position the proposed unit train rate violates the National

Transportation Policy. This issue was never raised in the two review cases heard by the Court of Appeals and is not properly before this Court. Furthermore, this contention is diametrically contrary to the National Transportation Policy enunciated in the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 10101. That section provides, in part:

> "(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, . . . it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
>
> (1) to recognize and preserve the inherent advantage of each mode of transportation;
>
> * * *
>
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
>
> (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;"

As heretofore shown, the position espoused by petitioners herein is anti-competitive and, if adopted, would subvert the National Transportation Policy.

Seafarers' petition also alleges that the second decision of the United States Court of Appeals had the effect of reversing the first decision in the same case. This contention is also without merit. The first decision of the United States Court of Appeals merely remanded the matter to

the Commission to further consider whether or not the unit train rate violated § 3(4) of the Act. Following remand the Commission scrupulously complied with the Court's mandate and concluded the unit train rate did not violate § 3(4). This conclusion was affirmed by the Court in its May 7, 1979 decision and reaffirmed by both the panel rendering that decision and the Court en banc by orders dated January 31, 1980. The same arguments which petitioners herein urge upon this Court were considered and rejected by the Court of Appeals en banc.

CONCLUSION

For all the reasons set forth above, the issuance of a writ of certiorari should be denied.

Respectfully submitted,

June 19, 1980.

C. Harold Peterson
Counsel for Soo Line Railroad Company
804 Soo Line Building
Minneapolis, Minnesota 55440
(612) 332-1261, Ext. 284

Nos. 79-1708, 79-1716 and 79-171

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

S & E SHIPPING CORP., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1708

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

No. 79-1716

S & E SHIPPING CORP., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 79-1718

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether the Commission correctly concluded that unittrain rates on wheat from the Twin Cities and Twin Ports to Martins Creek, Pennsylvania, do not discriminate against lake carriers in violation of former Section 3(4) of the Interstate Commerce Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Atchison, T. & S. F. Ry. v. *United States*, 218 F. Supp. 359 7

Atlantic Coast Line R.R. v. *United States*, 205 F. Supp. 360, aff'd, 371 U.S. 6 7

ICC v. *Mechling*, 330 U.S. 567 10

ICC v. *New York, N.H. & H. R.R.*, 372 U.S. 744 9

National Ass'n of Recycling Industries, Inc. v. *ICC*, No. 79-1393 (D.C. Cir. Apr. 25, 1980) 8

United States v. *Chicago Heights Trucking Co.*, 310 U.S. 344 8

Western Pacific R.R. v. *United States*, 382 U.S. 237 ..... 5, 7

Western Pacific R.R. v. *United States*, 263 F. Supp. 140 8

Page

Statutes:

Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1 *et seq.* (recodified as 49 U.S.C. (Supp. II) 10101 *et seq.* :

Section 3(1) (49 U.S.C. (Supp.II) 10741(b)) 2-3, 4

Section 3(4) (49 U.S.C. (Supp. II) 10701(c)) 1, 2-3, 4, 6, 7, 10

Section 15a(3) (49 U.S.C. (Supp. II) 10704(a)(2)) 9

Section 303(b) (49 U.S.C. (Supp. II) 10542)) 3-4

Transportation Act of 1958, Pub. L. No. 85-625, Section 15a(3), 72 Stat. 572 ..... 9, 10

Pub. L. No. 95-473, 92 Stat. 1337 3

Miscellaneous:

S. Rep. No. 1647, 85th Cong., 2d Sess. (1958) 9

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A-1 to A-25)[1] is reported at 568 F. 2d 887. The decision of the Commission upon remand from the court of appeals (Pet. App. A-26 to A-44) is reported at 356 I.C.C. 82. The second opinion of the court of appeals (Pet. App. A-45 to A-57) is reported at 600 F. 2d 349. The earlier decisions of the Commission are reported at 346 I.C.C. 814 and 351 I.C.C. 470.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1979, and petitions for rehearing were denied on January 31, 1980 (Pet. App. A-61 to A-63). The petitions for a writ of certiorari were filed on April 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Former Section 3(4) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 3(4) (recodified as 49 U.S.C. 10701(c)) is reproduced at Pet. App. A-64.

STATEMENT

This case involves a comparison of transportation rates for wheat over two different routes from certain origin points in the Midwest to Martins Creek, Pennsylvania, where respondent ConAgra, Inc., operates a flour mill. The origin points are Minneapolis and St. Paul, Minnesota (Twin Cities) and Duluth, Minnesota and Superior, Wisconsin (Twin Ports). There are no material differences between the rates from either origin, and for purposes of this case they may be considered as a single Midwest origin.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1708.

The first route is from the Midwest via lake carriers to Buffalo, New York, and from Buffalo via railroad (the Erie Lackawanna Railway Company, or Erie)[2] to Martins Creek (the "lake-rail route"). The second route is an all-rail route from the Midwest to Chicago, Illinois, via respondent Soo Line Railroad Company (Soo), and from Chicago to Martins Creek via the Erie (see map at Pet. App. A-10).

At all times material to this case, the Erie offered a five-car rate from Buffalo to Martins Creek of 40 cents per 100 pounds. During the months when the Great Lakes are open for navigation, the total rate for the lake-rail route from the Midwest to Martins Creek was 71.67 cents per 100 pounds (Pet. App. A-29).

In 1973, when ConAgra opened its mill at Martins Creek, the Soo and the Erie published a tariff jointly proposing a summer "unit-train" rate over the all-rail route of 72.25 cents per 100 pounds in order to be competitive with the lake-rail route (Pet. App. A-10, A-29, A-48). A unit-train consists of 50 or more cars, delivered as a unit, and is generally a more efficient and economical means of handling bulk shipments than movement by single or five-car lots (*id.* at A-52). Unit-trains are not offered, however, from Buffalo to points eastward, such as Martins Creek (*id.* at A-48).

Petitioners protested the proposed unit-train rates, contending that they discriminated against shippers, lake carriers and the port of Buffalo in violation of former Sections 3(1) and 3(4) of the Interstate Commerce Act

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[2]When the Commission commenced its investigation in 1973, the rail carrier from Buffalo to Martins Creek and from Chicago to Martins Creek was the Erie, which has since been acquired by respondent Consolidated Rail Corporation (Conrail). The rail carrier will be referred to herein simply as the Erie.

(recodified as 49 U.S.C. 10741(b) and 10701(c)).[3] Section 3(1) provides in pertinent part that "[i]t shall be unlawful for any common carrier subject to the provisions of this chapter * * * to subject any * * * person, company * * * port [etc.] to any undue or unreasonable prejudice or disadvantage * * *."[4] Section 3(4) provides in pertinent part: "All carriers subject to the provisions of this chapter * * * shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." Petitioners contended, among other things, that the rail portion of the lake-rail route (*i.e.*, from Buffalo to Martins Creek) yielded a higher profit per mile to the Erie than the Erie's division of the all-rail route; that the rate on the all-rail route diverted traffic from the lake-rail route; and that the disparity in rates was not justified.

In 1976, after an investigation, the Commission approved the rates and discontinued the investigation (Pet. App. A-12). The Commission concluded that because the protesting lake carriers were exempt from Commission regulation by former Section 303(b) of the

---

[3]The Interstate Commerce Act was recodified by Pub. L. No. 95-473, 92 Stat. 1337, but the recodification was not intended to make any substantive change in the law. Like the decisions of the Commission and the court of appeals, we will refer here to the former sections of the Act.

[4]Section 3(1) contains a limiting proviso stating:

> *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

The petitions for a writ of certiorari do not present any questions concerning petitioners' original Section 3(1) claims, and the scope of that section is not before this Court.

Act (recodified as 49 U.S.C. 10542),[5] they were not entitled to the protections of Section 3(4) (Pet. App. A-16). It also concluded that in any event Section 3(4) would not apply to these routes because the section applies only to "connecting carriers" and no such connecting carriers were involved here, since there is no point of interchange between the lake-rail route and the all-rail route (Pet. App. A-19 to A-20). In addition, the Commission rejected the claim that the rail carriers' rate discriminated against Buffalo in violation of Section 3(1) (Pet. App. A-23 to A-25).

On the initial petition for review, the court of appeals in 1977 upheld the Commission's rejection of petitioners' claims based on Section 3(1) (Pet. App. A-23 to A-25). However, the court disagreed with the Commission's conclusions that Section 3(4) does not protect exempt carriers and that Section 3(4) would not in any event apply to these routes (Pet. App. A-15 to A-22). It therefore remanded the case to the Commission for a determination of the merits of the Section 3(4) claim (Pet. App. A-22, A-25).

On remand, the Commission concluded that the rates did not violate Section 3(4) (Pet. App. A-26 to A-44). Although the Commission acknowledged that the Erie derived a higher net profit per mile on the movements from Buffalo to Martins Creek than on the unit-train movements over the all-rail route from the Midwest to Martins Creek, it found that, in view of traffic congestion and other operational deficiencies at Buffalo, "comparable unit-train service from Buffalo to Martins Creek would be inefficient and uneconomical * * *" (*id.*

---

[5]Former Section 303(b) of the Act provided: "Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk * * *."

at A-42). The Commission concluded that these facts established significant operating differences that justified the disparity in rates under the standards established in *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 246 (1965) (Pet. App. A-40 to A-42).

On review, the court of appeals, one judge dissenting, affirmed the Commission's conclusion that operating differences between the Buffalo-Martins Creek rail movements and the all-rail movements from the Midwest to Martins Creek justified the disparity in the rates (Pet. App. A-45 to A-57).[6] The court also noted (*id.* at A-52 to A-53) that additional evidence received by the Commission established that

> between 1973 and 1976, annual shipments of wheat to Buffalo by lake carrier increased by over 16.5 million tons, or approximately fifty percent. It disclosed also that, despite the adoption of the challenged unit-train rates, about fifty percent of ConAgra's wheat requirements are still transported by lake carrier and seventy percent of all grain movements from Buffalo to Martins Creek are by truck. This evidence gives little support to petitioner's claim of discrimination.

ARGUMENT

1. This case presents no conflict with the decisions of this Court or any court of appeals. In essence, the Commission's decisions upholding the lawfulness of the unit-train rates at issue are based on the Commission's expert appraisal of record evidence showing that the

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[6]The court also held that the five-car rate of 40 cents per 100 pounds for the rail movement from Buffalo to Martins Creek did not itself discriminate against lake carriers because that rate applied equally to traffic originating from the lake carriers and traffic originating from other rail carriers (Pet. App. A-50 to A-51).

operating conditions over the routes to which the unit-train rates apply were substantially different than the conditions found along the route on which the unit-train rate was not offered. The Commission's expert appraisal of the facts of this case does not present a question of general importance worthy of this Court's review.

Moreover, the court of appeals correctly upheld the Commission's conclusion that the facts did not establish discrimination in violation of Section 3(4).

Petitioners do not dispute the Commission's finding that substantial operating differences between the all-rail route from the Midwest to Martins Creek and the lake-rail route precluded unit-train service on the rail portion of the lake-rail route. Thus, the Commission found (Pet. App. A-41) that a chaotic traffic situation existed at the Buffalo terminal, causing inordinate traffic congestion and delay on rail shipments to Martins Creek. The elapsed time between the arrival of cars at Buffalo for loading and the arrival at Martins Creek for unloading was as much as 24 days, or three to four times as long as for the haul from Twin Ports to Martins Creek via unit-train (*id.* at A-42). The Commission also found a lack of elevator and storage facilities at Buffalo capable of accommodating three consecutive 50-car trainloads of grain and that the weather frequently brings about delays in the handling of freight cars at Buffalo (*id.* at A-41 to A-42); see also *id.* at A-35 to A-36, A-51 to A-52.

Petitioners nevertheless contend (79-1708 Pet. 11-12; 79-1716 Pet. 9; 79-1718 Pet. 11) that differences in rates can be based only on differences in the costs of transportation and that the unit-train rates therefore violated Section 3(4) because the Erie obtained a higher profit per mile from the Buffalo-Martins Creek part of the lake-rail route than from its division of the unit-train rates on the all-rail route. But petitioners' claim that only cost

differences can justify differences in rates is incorrect. Indeed, if that were the law, almost every rail rate in the country would have to be fixed at the identical revenue/cost ratio (*i.e.*, identical level of profit).

The Act does not mandate such an inflexible and unrealistic approach. Thus, in *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 246 (1965), relied on by the Commission (Pet. App. A-40), this Court stated:

> Relief [under Section 3(4)] is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the alleged discriminating carrier.

Similarly, in *Atlantic Coast Line R.R.* v. *United States*, 205 F. Supp. 360, 365 (M.D. Ga.) (three-judge court), aff'd, 371 U.S. 6 (1962), relied on by the court of appeals (Pet. App. A-51), the court, in addressing a claim of discrimination under Section 3(4), stated that "equality of treatment involves comparable conditions * * *."

These cases and others establish that factors other than cost may justify disparities in rates. In *Western Pacific*, for example, this Court expressly chose the words "operating conditions" rather than "operating costs" in stating the governing standard. 382 U.S. at 246. "Operating conditions" is a much broader term and embraces factors other than cost. Indeed, in *Atchison, T. & S. F. Ry.* v. *United States*, 218 F. Supp. 359, 367 (N.D. Ill. 1963), which this Court cited in *Western Pacific* in support of its Section 3(4) test, the three-judge district court held that such factors as strong motor competition and time-consuming terminal operations may properly be considered in determining whether a substantial similarity in transportation conditions exists between two areas. Moreover, in *Western Pacific*, after this Court remanded the case to the district court, that court considered

differences in transport time and loss of freight car utilization as between the favored and disfavored rail routes to determine whether there was a dissimilarity in operating conditions over those routes. *Western Pacific R.R.* v. *United States*, 263 F. Supp. 140, 151-152 (N.D. Cal. 1966).[7] See also *National Ass'n of Recycling Industries, Inc.* v. *ICC*, No. 79-1393 (D.C. Cir. Apr. 25, 1980), slip op. 17-18, recognizing that competition by motor carriers or barge lines for traffic in a particular commodity (which would call for a relatively lower rate) is a relevant difference in transportation conditions that may justify rate disparities. The factors considered in the foregoing cases are not quantifiable as differences in cost. Accordingly, these cases demonstrate that the Commission may consider a wide variety of operating characteristics in determining whether a rate disparity is justified.[8]

Because the Commission properly followed this Court's rule in *Western Pacific* and the case is bottomed on the Commission's expert judgment which the lower court properly upheld, it does not warrant this Court's review. See *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353 (1940).

2. The Commission's conclusion that the rates in this case were not unlawful is strongly reinforced by former

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[7]However, under the particular facts of that case the district court was unpersuaded that there were differences in operating conditions that substantially affected the discriminating carriers. 263 F. Supp. at 147, 151, 152.

[8]Both the Commission (Pet. App. A-29) and the court of appeals (*id.* at A-10 to A-11, A-53) recognized that the unit-train rates between the Twin Ports and Martins Creek were designed to compete with the water/rail rates and water/truck rates between the same points. The court of appeals correctly noted that this evidence gives little support to petitioners' claim of discrimination (*id.* at A-53).

Section 15a(3) of the Interstate Commerce Act (recodified as 49 U.S.C. 10704(a)(2)). That section, which was enacted in the Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 572, provided in pertinent part that:

> Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

In this case, the relief sought by petitioners before the Commission was the cancellation of the unit-train rate on the all-rail route. But it is undisputed that the rate of 72.25 cents per 100 pounds is fully compensatory to the rail carriers and was established to be competitive with the total rate of 71.67 cents per 100 pounds over the lake-rail route. In effect, petitioners seek to prevent the rail carriers from establishing a rate that is competitive with lake carriers, contrary to the requirements of Section 15(a)(3).[9] In *ICC* v. *New York, N.H. & H.R.R.*, 372 U.S. 744 (1963), this Court noted that the policy of Section 15a(3) was to permit each mode of transportation to use its own "inherent advantages, whether they be of service or of cost." 372 U.S. at 756, quoting from S. Rep. No. 1647, 85th Cong., 2d Sess. 3 (1958). The Court also stated (372 U.S. at 759):

> If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and

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[9]Although it may be that the rail carriers might have reduced the five-car rate from Buffalo to Martins Creek to make the revenue/cost ratio on that segment closer to the ratio on the all-rail route, petitioners never requested that relief.

> service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate * * *.

That statement is equally applicable here.[10]

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[10]Petitioners rely on *ICC* v. *Mechling*, 330 U.S. 567 (1947), in support of their discrimination claim, but that case is wholly inapposite. In *Mechling*, several railroads that shipped grain from Chicago to eastern markets charged a higher rate for grain that had been brought to Chicago from western points by connecting barges than for grain that had been brought to Chicago by other railroads, although there were no cost or other operating differences justifying the disparity. This Court held that the disparity discriminated against water carriers in violation of Section 3(4). In contrast, in this case it is undisputed, as the court of appeals found (Pet. App. A-48), that Erie charges the same rate between Buffalo and Martins Creek regardless of whether the traffic arrives at Buffalo by lake carrier or rail carrier. Moreover, nothing in *Mechling* suggests a departure from the principle established in *Western Pacific* and other cases that differences in operating conditions other than cost differences may justify differences in rates. Finally, after the *Mechling* decision Congress enacted the Transportation Act of 1958, which in former Section 15a(3) expressly authorizes the nation's railroads to set rates to compete with water carriers and other transportation modes.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

JULY 1980

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

PETER A. GREENE
900 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-8800

Attorney for Amici Curiae
Seaboard Allied Milling Corp.
ADM Milling Co.

THOMPSON, HINE AND FLORY
Of Counsel

June, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Seaboard Allied Milling Corp. ("Seaboard") and ADM Milling Co. ("ADM") respectfully move for leave to file

the attached brief *amici curiae* in this case. The consent of the attorneys for respondents United States of America, Interstate Commerce Commission, Consolidated Rail Corporation, Soo Line Railroad Company, the Pennsylvania Public Utility Commission, and ConAgra, Inc. has been obtained. The consent of petitioners S & E Shipping Corp. and Seafarers International Union of North America, AFL-CIO has been requested and refused. The consent of petitioner State of New York has been requested but no response to such request has been obtained.

The interests of Seaboard and ADM in this case arise from the grain milling facilities that they operate in New York State. Petitioners in this case have either directly asserted or strongly implied that the unit-train grain rate which is at issue has had and, if permitted to remain in effect, will continue to have a deleterious impact upon companies such as Seaboard and ADM who are substantially engaged in grain milling within the State of New York. Petitioners have also alleged that the rate at issue has had and, if permitted to remain in effect, will continue to have a negative impact on the lake carriers to whom Seaboard and ADM must look for water transportation of grain.

As alleged victims of the discrimination that petitioners contend to be inherent in the rate which is at issue in this case, Seaboard and ADM believe that their participation will assist the Court in obtaining a more accurate portrayal of the circumstances relevant to petitioners' assertions as to the allegedly discriminatory impact of the rate in issue.

Respectfully submitted,

PETER A. GREENE
900 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-8800

Attorney for Amici Curiae
Seaboard Allied Milling Corp.
ADM Milling Co.

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Respondents.

BRIEF AMICI CURIAE
IN OPPOSITION TO PETITIONS
FOR WRIT OF CERTIORARI

Seaboard Allied Milling Corp. ("Seaboard") and ADM Milling Co. ("ADM") submit that the petitions which have been filed with the Court in the above captioned cases do not identify any special or important issue that warrants issuance by this Court of the requested *writ of certiorari*. Seaboard and ADM respectfully request that the petitions be denied.

OPINION BELOW

The opinion of the U.S. Court of Appeals as to which review is sought by petitioners is reported at 600 F.2d 349.

JURISDICTION

The decision and mandate of the U.S. Court of Appeals as to which review is sought was entered on May 7, 1979. Petitions for rehearing were timely filed and rehearing was denied by order of the U.S. Court of Appeals dated January 31, 1980.

The statutory provision pursuant to which each of the petitioners seeks review is 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the opinion of the U.S. Court of Appeals affirming a decision of the Interstate Commerce Commission ("ICC") approving unit-train grain rates presents any special or important issue warranting review by this Court.

STATUTE INVOLVED

The principal statutory provision involved in these proceedings is Section 3(4) of the Interstate Commerce Act [49 U.S.C. § 3(4)] which is set out in Appendix G to the Petition of State of New York. The provisions of Section 3(4) have during the course of the proceedings

below been recodified without substantive change at 49 U.S.C. § 10701(c) and 49 U.S.C. § 10742. However, for purposes of consistency with statutory references in the opinions below, they are referred to herein by their former designation.

IDENTIFICATION AND INTERESTS OF SEABOARD AND ADM

Seaboard, with headquarters at Kansas City, MO., and ADM, with headquarters at Shawnee Mission, KS., are major agri-business companies engaged in milling and distribution of grain products. They each operate mills at various locations throughout the United States and are major users of both rail and water carrier transportation in connection with the movement of grain to their mills and the movement of grain products from their mills to their customers.

As is particularly pertinent here, Seaboard operates major milling facilities at both Albany and Buffalo, NY, and ADM operates a major milling facility at Hudson, NY. These mills represent investments of many millions of dollars and account for a significant percentage of the grain products milled in the State of New York.

The Buffalo mill can receive grain either by lake vessel or by unit train. The mills at Albany and Hudson can receive grain either by combination lake-rail movement or by all rail movement including transportation in unit trains which is the most efficient and economical method of moving large quantities of grain by rail. The unit train rates by which Seaboard and ADM move grain to their New York mills are constructed on the same basis as the unit train rate to Martins Creek which is at issue in these proceedings.

Both Seaboard and ADM incur transportation costs of tens of millions of dollars each year in the movement

of grain and grain products. Because the successful operation of the grain milling business is so heavily dependent upon the availability of responsive and affordable transportation services, both ADM and Seaboard have a direct interest in the maintenance and preservation of an economically sound national transportation system. In the procurement of their raw materials, in the location of their milling facilities, and in the distribution of their products, they are vitally concerned with taking the greatest possible advantage of the inherent capabilities of both water and rail transportation. They patronize both modes. They have a strong interest in maintaining the availability and economic vitality of each.

REASONS FOR DENYING THE WRIT

Seaboard and ADM believe, on the basis of their own experience as major users of both rail and water transporation, that the present relationship between lake and rail transportation of grain is fair and equitable and has been instrumental in stimulating a healthy and vigorous intermodal competitive environment which inures to the benefit of the milling industry in general and milling facilities within New York State in particular. The present highly desirable competitive environment is a direct consequence of the availability of unit train rates to New York milling locations. These rates are predicated upon the unit-train rate to Martins Creek which is fundamentally at issue in these proceedings.

The viability of both the Seaboard mill at Albany and the ADM mill at Hudson is dependent upon the continued availability of economical, efficient unit-train transportation of grain from midwestern producing areas. The availability of this competitive alternative and the restraint that it has imposed on transportation costs has directly contributed to the competitive ability of milling facilities in New York State. This has inured to the bene-

fit of the bakers who now have important alternative sources from which to buy flour and, in turn, the general public for whom baked goods are such a basic necessity of life.

Thus, the Martins Creek rate which is under attack in this proceeding has had and will continue to have a very salutory effect on the vitality and growth of the grain milling industry in New York, and on the consumers who are served by that industry. Seaboard and ADM* have no quarrel with it. Nor have they seen any indication that any of the lake carriers engaged in grain transportation have had any difficulty in maintaining a substantial market share of available traffic in spite of unit-train competition. Indeed, as the supplemental evidence received and considered by the ICC demonstrates, the total volume of grain handled by lake carriers to Buffalo has actually increased very steadily and very substantially since the Martins Creek unit-train rate became effective. See *Unit Train Rates on Wheat, Minn. & Wis. to Martins Creek, Pa.*, 356 ICC 82, 85 (1978).

New York's petition is predicated upon a very basic misapprehension of the impact of the Martins Creek rate on those who are involved in agricultural commerce in New York, including Seaboard and ADM. New York asserts that the rate has had a negative effect. Seaboard and ADM respectfully submit that such an assessment is simply and plainly wrong. They further submit that, as active participants in the grain trade in New York, they are in a far more advantageous position to accurately assess the impact of the Martins Creek unit-train rate than are the officials who have authorized the

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*** Although ADM originally opposed the Martins Creek unit-train rate before the ICC, it has long since abandoned that opposition and come to recognize that the availability of unit-train service as a competitive alternative to lake-rail service is in the public interest.**

filing of a petition with this Court on behalf of New York. It is for this reason that Seaboard and ADM have felt compelled to submit this brief in order that the Court, in its deliberation of this matter, may have before it the positions of two companies who are active and important participants in the flow of commerce that is allegedly prejudiced by the Martins Creek rate.

In sum, the legal arguments of New York and the two supporting petitioners are grounded squarely on the assumption that the Martins Creek unit-train rate has caused competitive injury to New York millers and the carriers (including lake carriers) on whom they depend for efficient, viable transportation of grain. However, that assumption, as demonstrated by the actual experiences of Seaboard and ADM, is totally incorrect.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

PETER A. GREENE
900 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-8800

Attorney for Amici Curiae
Seaboard Allied Milling Corp.
ADM Milling Co.

THOMPSON, HINE AND FLORY
Of Counsel

June, 1980

CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33(3), I hereby certify that copies of the foregoing motion and accompanying brief *amici curiae* have been served upon the following named counsel of record, via first class mail, postage prepaid, this 20th day of June, 1980:

Robert Abrams
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

Shirley Adelson Siegel
Solicitor General of the
State of New York
The Capitol
Albany, New York 12224

Jeremiah Jochnowitz
Assistant Solicitor General
of the State of New York
The Capitol
Albany, New York 12224

Robert J. Ables, Esq.
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Howard Schulman, Esq.
David Jaffe, Esq.
Schulman & Abarbanel
350 Fifth Avenue
New York, New York 10001

C. Harold Peterson
General Counsel
Soo Line Railroad Company
806 Soo Line Building
Minneapolis, Minnesota 55440

John A. Daily, Esq.
Senior Commerce Counsel
Consolidated Rail Corporation
6 Penn Center Plaza
Philadelphia, Pennsylvania 19104

Gordon P. MacDougall, Esq.
1120 - 19th Street, N.W.
Washington, D.C. 20036

Peter A. Greene

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